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IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

BASIC AMERICAN INDUSTRIES INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of anticipatory repudiation apply to change the accrual date for a cause of action for interim withdrawal liability payments under Section 4219(c)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1399(c)(5)?

2. Assuming *arguendo* that the doctrine of anticipatory repudiation applies, does the mere cessation of operations in bankruptcy by the contributing entity constitute an anticipatory repudiation where other solvent controlled group members are jointly and severally liable for the interim withdrawal liability payments?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Central States, Southeast and Southwest Areas Pension Fund is a multiemployer employee benefit plan and trust and has no corporate affiliations. Petitioner Howard McDougall is one of the Trustees of the Central States, Southeast and Southwest Areas Pension Fund and has no corporate affiliations.

Respondents

Respondents are Basic American Industries, Inc., Jackson's Realty & Builders Company, Inc., C & B Wood Suppliers, Inc., E & F Realty Co., Waterfront Development Co., Inc., EFB Development Co., Inc., Turtle Creek Investment Co., Liquid Oil Growers Organization, Inc., Southwest Agri-Development Specialists, Inc., EFB Development Company, Sanibel Development Company, Sanibel Investment Company, Turtle Creek of Tennessee, Hato Rey Professional Arts, Inc., Turtle Creek North Apartments of Frankfort, Turtle Creek Apartments of Connersville, Turtle Creek Apartments of Marion, Toxbury Square, Ltd., Turtle Creek of Indiana, EFB Development Company, Sanibel Investment Co., Wheel Estates, EFB Coal Company, Inc., Horn AG Services, Inc., Table Fresh Grapes, Inc., Arizona Desert Growers, Desert Vineyards, Inc., Red Mountain Products, and The Racquets IV Tennis Club, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. BACKGROUND OF MPPAA AND ITS DEFAULT AND ACCELERATION PROVISIONS	11
II. BAY AREA HOLDS THAT A CAUSE OF ACTION ACCRUES UNDER MPPAA WHEN EACH PAYMENT IS MISSED	14
III. BAY AREA APPLIES IN THE BANKRUPTCY CONTEXT	16
IV. NEITHER A WITHDRAWAL NOR A CESSATION OF OPERATIONS CONSTITUTES A DEFAULT	19
V. THE RIGHT TO ARBITRATION PREVENTS ACCELERATION	20
VI. BOTH THE STATUTE AND BAY AREA MAKE DEFAULT DISTINCT FROM ACCELERATION	21

TABLE OF CONTENTS—Continued

	Page
VII. THE STATUTE DID NOT BEGIN TO RUN ON THE DATE OF THE ANTICIPATORY REPUDIATION	22
VIII. ALLIED'S INABILITY TO PAY DOES NOT CONSTITUTE REPUDIATION BECAUSE ALL TRADES OR BUSINESSES UNDER COMMON CONTROL ARE JOINTLY AND SEVERALLY LIABLE FOR PAYMENT	26
CONCLUSION	27
APPENDIX A	1a
APPENDIX B	13a
APPENDIX C	15a
APPENDIX D	29a
APPENDIX E	30a

TABLE OF AUTHORITIES

CASES — Page

Artistic Carton Co. v. Paper Indus. Union-Management Pension Fund, 971 F.2d 1346 (7th Cir. 1992) 11

Bay Area Laundry & Dry Cleaning Pension Trust v. Ferbar Corp., 522 U.S. 192, 118 S.Ct. 542 (1997) ..... *passim*

Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Engineering Corp., 43 F.3d 852 (3rd Cir. 1994) 15, 16

Central States, S.E. & S.W. Areas Pension Fund v. Basic Am. Indus., Inc., 252 F.3d 911 (7th Cir. 2001) 1

Central States, S.E. & S.W. Areas Pension Fund v. Bell Transit Co., 22 F.3d 706 (7th Cir. 1994) 12, 13

Central States, S.E. & S.W. Areas Pension Fund v. Ditello, 974 F.2d 887 (7th Cir. 1992) 13

Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148 (7th Cir. 1989) (*en banc*) 24

Central States, S.E. & S.W. Areas Pension Fund v. Johnson, 991 F.2d 387 (7th Cir. 1993) 12, 13

Central States, S.E. & S.W. Areas Pension Fund v. Navco, 3 F.3d 167 (7th Cir. 1993) 8, 15

Central States, S.E. & S.W. Areas Pension Fund v. Sherwin-Williams Co., 71 F.3d 1338 (7th Cir. 1995) 12

Central States, S.E. & S.W. Areas Pension Fund v. Slotky, 956 F.2d 1369 (7th Cir. 1992) 26

Central States, S.E. & S.W. Areas Pension Fund v. Wintz Properties, Inc., 155 F.3d 868 (7th Cir. 1998) 13, 20

TABLE OF AUTHORITIES—Continued

Page

Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc., 125 F.3d 526 (7th Cir. 1997) 20
Concrete Pipe & Prods of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 113 S.Ct. 2264 (1993) 12
Connolly v. PBGC, 475 U.S. 211, 106 S.Ct. 1018 (1986) 11, 12
Franconia Assocs. v. United States, 240 F.3d 1358 (Fed. Cir. 2001) 10, 24
Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119 (D.C. Cir. 1989) 15
Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co., 513 U.S. 414, 115 S.Ct. 981 (1995) 12
New York Life Ins. Co. v. Vislas, 297 U.S. 672, 56 S.Ct. 615 (1936) 23
PBGC v. R.A. Gray & Co., 467 U.S. 717, 104 S.Ct. 2709 (1984) 11
Peick v. PBGC, 724 F.2d 1247 (7th Cir. 1983) 11
Penn-Ohio Steel Corp. v. United States, 354 F.2d 254 (Ct. Cl. 1965) 25
Roehm v. Horst, 178 U.S. 118, 20 S.Ct. 780 (1900) 24
Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994) 11
Smyth v. United States, 302 U.S. 329, 58 S.Ct. 248 (1937) 10, 23, 24
Trustees of the Chicago Truck Drivers Union (Indep.) Pension Fund v. Leaseway Transp. Corp., 76 F.3d 824 (7th Cir. 1996) 11
White v. Prenzler, 131 N.E.2d 540 (Ill. 1956) 25

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	5
28 U.S.C. § 2101(c)	2
29 U.S.C. § 1002(37)	4
29 U.S.C. § 1132(e)	5
29 U.S.C. § 1301(a)(3)	4
29 U.S.C. § 1301(b)(1)	2, 5, 13, 26
29 U.S.C. § 1381	12
29 U.S.C. § 1381(b)	4
29 U.S.C. § 1382	12
29 U.S.C. § 1382(2)	4
29 U.S.C. § 1383(a)	12
29 U.S.C. § 1383(a)(2)	19
29 U.S.C. § 1390(b)(1)	13
29 U.S.C. § 1391	12
29 U.S.C. § 1399(b)	20
29 U.S.C. § 1399(b)(1)	4
29 U.S.C. § 1399(b)(2)	13
29 U.S.C. § 1399(c)(5)	i, 3, 14, 16, 17, 18, 25
29 U.S.C. § 1399(c)(5)(B)	23
29 U.S.C. § 1401(a)	20
29 U.S.C. § 1401(a)(1)	13
29 U.S.C. § 1451(c)	5
29 U.S.C. § 1451(f)	3
29 U.S.C. § 1451(f)(1)	13

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OPINIONS BELOW

The June 5, 2001, opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Central States, S.E. & S.W. Areas Pension Fund v. Basic Am. Indus., Inc.*, 252 F.3d 911 (7th Cir. 2001), and is set forth in Appendix hereto (App. A at 1a-12a).

The February 27, 1998, Order dismissing the original appeal entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix B hereto (App. B at 13a-14a).

The October 18, 2000, Memorandum and Order dismissing the case entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix C hereto (App. C at 15a-28a).

The July 3, 2001, Order denying rehearing and rehearing *en banc* entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix D hereto (App. D at 29a).

The September 30, 1997, Minute Order dismissing the case entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix E hereto (App. E at 30a-31a).

BASIS FOR JURISDICTION

On June 5, 2001, the Judgment of the United States Court of Appeals for the Seventh Circuit was entered. On July 3, 2001, the United States Court of Appeals for the Seventh Circuit entered an order denying rehearing and rehearing *en banc*. This petition for writ of certiorari is filed within 90 days of the denial of rehearing. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1), provides:

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single

employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the treasury under section 414(c) of Title 26.

Section 4219(c)(5) of ERISA as amended by MPPAA, 29 U.S.C. § 1399(c)(5), provides:

> (5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—
>
> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

Section 4301(f) of ERISA as amended by MPPAA, 29 U.S.C. § 1451(f), provides:

> (f) Time limitations
>
> An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

Allied Companies, Inc. ("Allied") entered into various collective bargaining agreements with various local unions affiliated with the International Brotherhood of Teamsters under which Allied had an obligation to contribute pension contributions on behalf of certain of its employees to Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States"). Central States is a multiemployer pension plan within the meaning of sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301(a)(3). In 1989, Allied filed for bankruptcy protection under Chapter 11. On or about June 2, 1990, Allied ceased covered operations. As a result, Allied and all trades or businesses under common control with it (the "Allied Controlled Group") effected a complete withdrawal from Central States as defined by Section 4201(b) of ERISA, as amended by MPPAA, 29 U.S.C. § 1381(b). Consequently, all members of the Allied Controlled Group were jointly and severally liable for withdrawal liability to Central States in the amount of $751,918.80.

On or about June 22, 1990, the Allied Controlled Group received a notice and demand for payment of the withdrawal liability issued by Central States in accordance with Sections 4202(2) and 4219(b)(1) of ERISA, 29 U.S.C. §§ 1382(2) and 1399(b)(1). Pursuant to the notice and demand, the first payment in the amount of $59,524.30 was due on August 1, 1990. A total of 13.87 payments were to have been made with each payment due on the first of the month. Central States also filed two proofs of claim with respect to Allied in the bankruptcy proceeding. Both of the proofs of claim listed August 1, 1990, as the due date for the first payment of $59,524.30 and included a payment schedule of 13.87 payments.

Petitioners (Plaintiffs and Appellants below) Central States and Howard McDougall, trustee, filed the Complaint on

July 31, 1996, seeking to collect withdrawal liability under ERISA as amended by MPPAA from certain of the Respondents (Defendants and Appellees below) namely, Basic American Industries, Inc., Jackson's Realty & Builders Company, Inc., C & B Wood Suppliers, Inc., E & F Realty Co., Waterfront Development Co., Inc., EFB Development Co., Inc., Turtle Creek Investment Co., Liquid Oil Growers Organization, Inc., Southwest Agri-Development Specialists, Inc., and Brady R. Justice (collectively the "Original Defendants").[1] The Complaint asserted that these Original Defendants were jointly and severally liable for withdrawal liability under 29 U.S.C. § 1301(b)(1) by virtue of their membership in a controlled group of corporations with Allied Companies, Inc. ("Allied"). The Complaint sought to collect $751,918.80 in withdrawal liability, as well as interest, the greater of interest or liquidated damages, and reasonable attorney's fees and costs. Jurisdiction in the district court was invoked under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e) and 1451(c).

On November 22, 1996, within the 120 days allowed for service under Federal Rule of Civil Procedure 4(m), Central States filed a motion to extend the service period for 45 days. The District Court granted the motion on November 26, 1996, and allowed Central States until January 9, 1997, to effectuate service. On December 20, 1996, Central States filed the First Amended Complaint. The nature of the claim asserted in the First Amended Complaint was the same as in the Complaint. However, numerous parties were added as Defendants, among them EFB Development Company,[2] Sanibel

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[1] Additional parties were named as Defendants in the Complaint but were subsequently dropped from the case in the First Amended Complaint.

[2] Despite the similarity between the names EFB Development Company and EFB Development Co., Inc., the two Defendants are separate as the former is actually a partnership whereas the latter is a

Development Company, Sanibel Investment Company, Turtle Creek of Tennessee, Hato Rey Professional Arts, Inc., Turtle Creek North Apartments, Village Green Apartments, Turtle Creek Apartments of Kokomo, Turtle Creek Apartments of Frankfort, Turtle Creek Apartments of Connersville, Turtle Creek Apartments of Marion, Roxbury Square, Ltd., Turtle Creek of Indiana, EFB Development Company, Sanibel Investment Co.,[3] Wheel Estates, EFB Coal Company, Inc., Horn AG Services, Inc., Table Fresh Grapes, Inc., Arizona Desert Growers, Desert Vineyards, Inc., Red Mountain Products, The Racquets IV Tennis Club, Inc. (collectively the "Amended Defendants").

On February 26, 1997, the Original Defendants filed a motion to vacate the District Court's November 26, 1996, order that granted Central States an extension of time for service of process. Also, on February 26, 1997, the Amended Defendants filed a motion to dismiss contending that the withdrawal liability claim was barred by the statute of limitations.

On September 30, 1997, the District Court granted the Amended Defendants' motion to dismiss and granted the Original Defendants' motion to vacate the District Court's ruling allowing the extension of time for service as to the Original Defendants. App. E at 30a-31a. The District Court indicated that a detailed order setting forth the grounds for the rulings would be forthcoming on or before October 31, 1997. App. E at 30a.

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corporation. Also, there are two separate entities named EFB Development Company. The first, named in both the Complaint and the First Amended Complaint is an Indiana partnership. The second, named in the First Amended Complaint, is a Florida partnership.

[3] There are two entities named Sanibel Investment Co. The first, named in both the Complaint and the First Amended Complaint, is an Indiana partnership. The second, named in the First Amended Complaint, is a Florida partnership.

On October 30, 1997, Central States filed a notice of appeal to protect its rights should the September 30, 1997, ruling be considered a final decision. However, on February 27, 1998, the Seventh Circuit dismissed the appeal due to the lack of a Circuit Rule 50 explanation by the District Court as to the reasons for the dismissal coupled with the absence of the entry of a final judgment under Federal Rule of Civil Procedure 58. App. B at 13a-14a.

After the mandate issued, the District Court allowed the parties to file supplemental memoranda and responses thereto regarding the Court's rulings. Over two years after the case returned to the District Court and the supplemental memoranda were filed, the District Court issued a Memorandum and Order on October 18, 2000, reinstating the original rulings and providing explanation as to the grounds for the District Court's rulings. App. C at 15a-28a. On November 6, 2000, Central States filed a Notice of Appeal.

On June 5, 2001, the Seventh Circuit affirmed the decision of the District Court. App. A at 1a-12a. The Seventh Circuit's decision sets forth the following key relevant facts. In chronological order they are: (1) June 22, 1989—a trio of affiliated corporations (collectively "Allied Grocers") (not the entire controlled group) declared bankruptcy under Chapter 11 of the Bankruptcy Code; (2) May 18, 1990—Central States filed a proof of claim in the bankruptcy in the amount of some $752,000 setting forth an installment schedule; (3) June 2, 1990—Allied ceased *covered* operations triggering a complete withdrawal; (4) June 18, 1990—Allied receives a notice and demand from Central States in the same amount as the proof of claim setting forth a payment schedule of 14 payments with the first payment due on August 1, 1990; and (5) July 31, 1996—Central States files suit against various controlled group members that were not in bankruptcy. App. A at 2a-3a.

Based on these facts, the Seventh Circuit held that the statute of limitations began to run on June 18, 1990, the date Allied received the notice and demand from Central States. App. A at 12a. Respondents never argued that the cause of action accrued on that date. Rather, Respondents argued that the statute began to run on May 18, 1990 (the date the proof of claim was filed) because the filing of a proof of claim allegedly constituted an automatic acceleration of the claim. Second, Respondents argued that even if the proof of claim did not constitute automatic acceleration, Central States' plan treated the bankruptcy filing date of June 22, 1989, as a default. However, the Seventh Circuit rejected both of these arguments finding that the plan language did not amount to a "Doomsday Bomb" requiring acceleration and because the withdrawal had not even occurred at the time the proof of claim was filed. App. A at 8a. Thus, at this point in the analysis, the Seventh Circuit had rejected every argument made by Respondents on appeal regarding the proper date for accrual of the cause of action.[4]

However, instead of finding in favor of Central States, the Seventh Circuit instead held that the cause of action accrued on June 18, 1990, when Central States issued the notice and demand. In reaching this result, the Seventh Circuit took the following steps: (1) The Seventh Circuit states that *Bay Area*

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[4] Notably, the Seventh Circuit did not adopt the reasoning articulated by the district court in support of its opinion, namely, that the statute of limitations accrued with respect to all missed payments on the date the first payment was missed (August 1, 1990). The district court had relied on *Central States, S.E. & S.W. Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), to support its reasoning without even citing *Bay Area Laundry & Dry Cleaning Pension Trust v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542 (1997), despite the fact that *Bay Area* had overruled *Navco*. Thus, Central States never received an opportunity to respond to the argument ultimately adopted by the Seventh Circuit because neither Respondents nor the District Court ever made or relied on such an argument.

was limited by its context which did not include bankruptcy. App. A at 4a. As a result, the Seventh Circuit states that because the statute of limitations under MPPAA is to be assimilated to legal principles generally applicable to statute of limitations issues, the doctrine of anticipatory repudiation comes into play. App. A at 4a-6a. (2) After rejecting Respondent's only arguments (relating to the proof of claim), the Seventh Circuit states that complete cessation of operations precipitates a complete withdrawal and therefore "[t]hat was the default." App. A at 9a. (3) The Seventh Circuit states that although a plan cannot accelerate until the employer has a chance to invoke the right to arbitrate (nor during the arbitration itself), "the right to arbitration presupposes that the cause of action has already arisen." App. A at 9a. (4) The Seventh Circuit states that "[t]he Supreme Court made clear in *Bay Area* that the statutory requirement [of having installment payments] does not *prevent* the fund from accelerating all future payments upon default." App. A at 10a-11a (emphasis added). As a result, the Seventh Circuit states that therefore "the only question is whether there was a default." App. A at 11a. (5) The Seventh Circuit states that the "standard rule" in contract law is that the promisee is free to sue on the date of the anticipatory repudiation. App. A at 11a. (6) After noting that "commercial miracles" are possible and that the doctrine of anticipatory repudiation "does not traffic in the miraculous," the Seventh Circuit felt it was "reasonably certain" that Allied would not make the payments due to the cessation of operations. App. A at 12a. Thus, the Seventh Circuit concluded that: (1) there was an anticipatory repudiation on June 18, 1990 (the date of Central States' notice and demand); and (2) that the statute began to run on that date with respect to the entire payment schedule. App. A at 12a. Central States filed a petition for rehearing and petition for rehearing *en banc* that was denied on July 3, 2001. App. D at 29a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision in this case creates uncertainty as to when a cause of action accrues under MPPAA by contradicting the plain language of both the statute and this Court's decision in *Bay Area*. In *Bay Area*, this Court made it clear that a cause of action under MPPAA does not accrue until a payment is missed. Further, this Court made it clear that there was no acceleration of the withdrawal liability obligation unless the pension plan gave clear notice of its intent to accelerate.

Here, the Seventh Circuit applied the doctrine of anticipatory repudiation to hold that the cause of action accrued with respect to the entire payment schedule before the first payment was even due. In doing so, the Seventh Circuit brought through the back door its *Navco* decision that was overruled in *Bay Area*.[5]

Further, the Seventh Circuit failed to recognize that this Court has stated that the doctrine of anticipatory repudiation generally has no application to unilateral contracts, and particularly no application to contracts for the payment of money. *Smyth v. United States*, 302 U.S. 329, 356, 58 S.Ct. 248, 253 (1937). In addition, even when the doctrine applies, the cause of action accrues at the normal time for performance unless the obligee elects to sue earlier asserting an anticipatory breach. *Franconia Assocs. v. United States*, 240 F.3d 1358, 1363-64 (Fed. Cir. 2001).

The clarity provided by this Court's decision in *Bay Area* has been replaced by the uncertainty of the misapplication of a doctrine that does not even apply in this context. This Court should grant the petition for a writ of certiorari to ensure that the uniformity and clarity in this area provided in *Bay Area* is not undermined.

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[5] Interestingly, two of the three judges that decided this case, namely, Judges Bauer and Coffey, were on the panel that decided the *Navco* case.

I. BACKGROUND OF MPPAA AND ITS DEFAULT AND ACCELERATION PROVISIONS

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. *Connolly v. PBGC*, 475 U.S. 211, 214, 106 S.Ct. 1018, 1020 (1986). As part of ERISA, Congress established the Pension Benefit Guaranty Corporation ("PBGC") to protect the pensions of workers who were participants in failed pension funds. *Id.* However, ERISA did not obligate the PBGC to guarantee payments with respect to multiemployer plans until January 1, 1978. *Id.* During this interim period, Congress became concerned with the debilitating effect that employer withdrawals have on multiemployer plans. *Id.* at 215, 106 S.Ct. at 1021; *see generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720-25, 104 S.Ct. 2709, 2713-15 (1984); *Peick v. PBGC*, 724 F.2d 1247, 1251-56 (7th Cir. 1983). The withdrawal of an employer can have a domino effect on a multiemployer plan because the withdrawal of one employer increases the burden on the other employers in the plan in turn leading those other employers to fail. *Connolly*, 475 U.S. at 215, 106 S.Ct. at 1021; *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725, 726-27 (7th Cir. 1994). Furthermore, employers fearing this domino effect might attempt to withdraw from a multiemployer fund because of a perception of rising obligations. Of course, such perceptions become reality because the withdrawal of that employer sets off the very domino effect that the withholding employer hoped to avoid. *Id.*; *Artistic Carton Co. v. Paper Indus. Union-Management Pension Fund*, 971 F.2d 1346, 1348 (7th Cir. 1992) ("[A] series of withdrawals, much like a bank run, can leave the fund unable to pay off vested obligations.") This, in turn, leads to increased taxpayer expense because the PBGC must then cover the shortfall. *See Trustees of the Chicago Truck Drivers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 827 (7th Cir. 1996). In addition, the

insurance for pension plans is far from complete, and pensioners may ultimately be at risk of losing a substantial portion of their pensions even with the insurance provided by the PBGC.

As a result, Congress enacted MPPAA. MPPAA, like most other provisions of ERISA, is intended to avoid the "great personal tragedy" that occurs when pension expectations are frustrated. *Central States, S.E. & S.W. Areas Pension Fund v. Johnson*, 991 F.2d 387, 392 (7th Cir. 1993). MPPAA imposes withdrawal liability on an employer withdrawing from a multiemployer pension plan which is measured as the employer's proportionate share of the plan's unfounded vested benefits, *i.e.*, the difference between the present value of the vested benefits and the current value of the plan's assets. *Connolly*, 475 U.S. at 217, 106 S.Ct. at 1022; 29 U.S.C. §§ 1381, 1391; *see generally Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S.Ct. 981 (1995) (discussing details of withdrawal liability calculation). An employer completely withdraws from a plan when it "permanently ceases to have an obligation to contribute under the plan" or when it "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a); *Central States, S.E. & S.W. Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1339 (7th Cir. 1995). Upon withdrawal, MPPAA provides a detailed dispute resolution procedure. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 196-97, 118 S.Ct. 542, 547 (1997) (discussing details of dispute resolution process); *Concrete Pipe & Prods of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264 (1993) (discussing burden of proof and standard of review in arbitration proceeding).

To collect withdrawal liability, a plan must first "determine the amount of withdrawal liability owed by a withdrawing employer." 29 U.S.C. §§ 1382, 1391; *Central States, S.E. &*

S.W. Areas Pension Fund v. Bell Transit Co., 22 F.3d 706, 707 (7th Cir. 1994). The plan must then send the employer a notice and demand for payment. 29 U.S.C. § 1390(b)(1); *Bell Transit*, 22 F.3d at 707. The employer may ask the plan to review its assessment under 29 U.S.C. § 1399(b)(2); *Bell Transit*, 22 F.3d at 707. If dissatisfied with the review, the employer may initiate arbitration. 29 U.S.C. § 1401(a)(1); *Bell Transit*, 22 F.3d at 707.

If the employer fails to initiate arbitration, the assessment becomes due and owing and the plan may sue to collect it. 29 U.S.C. § 1401(a)(1); *Bell Transit*, 22 F.3d at 707. However, even if the employer initiates arbitration, the employer must continue to pay in accordance with the schedule of payments. *Bell Transit*, 22 F.3d at 707. The requirement that the employer make interim payments (interim in the sense that they are due between the time a fund sends out the notice and demand and the final determination of liability) sets up a "pay now, dispute later" scheme. *Central States, S.E. & S.W. Areas Pension Fund v. Wintz Properties, Inc.*, 155 F.3d 868, 876 (7th Cir. 1998).

Reinforcing the protection afforded to pension funds is Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1). Under this section, all trades or businesses under common control are treated as a single employer for purposes of assessing and collecting withdrawal liability. *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887, 889-90 (7th Cir. 1992). As a result, all trades or businesses under common control are jointly and severally liable for withdrawal liability. *Johnson*, 991 F.2d at 388. One of the purposes of this section is to prevent a business subject to withdrawal liability from "fractionalizing its operations" or shifting assets to avoid its obligations to a pension plan. *Id.*

Under MPPAA, an action may not be brought more than six years after the date on which the cause of action arose. 29 U.S.C. § 1451(f)(1). Because MPPAA requires a payment

schedule, questions arise as to when a cause of action accrues for a missed payment. Questions also arise regarding the effect of a missed payment on the accrual of the statute of limitations for payments due subsequent to the missed payment. MPPAA contains the following provision impacting these questions:

> (5) In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "*default*" means—
>
> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. § 1399(c)(5) (emphases added). Thus, under this statute, two distinct events are required before the entire amount of withdrawal liability assessment becomes immediately due: (1) a default as defined in the statute; and (2) the affirmative exercise of the plan's discretion to accelerate.

II. *BAY AREA* HOLDS THAT A CAUSE OF ACTION ACCRUES UNDER MPPAA WHEN EACH PAYMENT IS MISSED

In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S. Ct. 542 (1997), this Court construed MPPAA in determining when a cause of action accrues. In that case, the Ninth Circuit held that the cause of action accrued on the date of withdrawal. This Court

rejected that position and held that "the statute does not begin to run on withdrawal liability until a scheduled payment is missed." *Id.* at 195, 118 S. Ct. at 546. This Court based its holding on the fact that "MPPAA affords a plan no basis to obtain relief from an employer on that date [of withdrawal]." *Id.* at 201, 118 S. Ct. at 549. Rather, "withdrawal 'merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment.'" *Id.* at 201-02, 118 S. Ct. at 549 (quoting *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir. 1989)).

This Court went on to resolve a question that had split the Seventh Circuit from the Third Circuit, namely, whether the statute of limitations begins to run with respect to the entire payment schedule when the first payment is missed (as the Seventh Circuit had held), or whether each missed payment creates a separate cause of action with its own six-year limitations period (as the Third Circuit had held). *Compare Central States, S.E. & S.W. Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993) *with Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994). This Court (following the Third Circuit's *Kahle* decision and rejecting the Seventh Circuit's *Navco* decision) held that each missed payment creates a separate cause of action with its own six-year limitations period. *Bay Area*, 522 U.S. at 206-10, 118 S. Ct. at 551-53.

In reaching this holding, this Court noted that "[j]ust as a pension plan cannot sue to recover *any* withdrawal liability until the employer misses a scheduled payment, so too must the plan generally wait until the employer misses a particular payment before suing to collect *that payment*." *Id.* at 208, 118 S. Ct. at 552. Further, in a passage that has great bearing on the instant case, this Court stated:

> The general rule [that each missed payment creates a separate cause of action with its own limitations period]

> applies even though a plan has the *option* to accelerate and collect the entire debt if the employer defaults. See 29 U.S.C. § 1399(c)(5). For limitations purposes, we cannot assume that a default will or should invariably lead to acceleration, for the statutory acceleration provision is by its terms permissive. See *ibid.* ("In the event of a default, a plan sponsor *may* require immediate payment . . . .") (emphasis added [in original]). Trustees confronting a delinquent employer may accelerate if they decide such a course is in the best interests of the plan, but they need not do so to preserve the plan's right to recover future payments. Cf. *Kahle Engineering Corp.*, 43 F.3d, at 859, and n. 7 (describing reasons why acceleration might not be in the plan's best interests). This, again, is the rule that generally applies to installment obligations. If the creditor refrains from exercising the acceleration option, the limitations period on a particular payment runs from the date that payment becomes due.

Bay Area, 522 U.S. at 208-09, 118 S. Ct. at 552 (emphasis added). Following this passage, the Court remarked that "[l]ike the typical installment creditor, the plan has no right, absent default *and acceleration*, to sue to collect payments before they are due, *and it has no obligation to accelerate on default*." *Id.* at 210, 118 S. Ct. at 553 (emphases added).

III. *BAY AREA* APPLIES IN THE BANKRUPTCY CONTEXT

The Seventh Circuit distinguished *Bay Area* because it was not decided in the bankruptcy context. However, the statutory language and *Bay Area* itself make it clear that this is a distinction without a difference. As stated earlier, the statute provides that a plan *may* accelerate in the event of a default. 29 U.S.C. § 1399(c)(5). However, the statute does not *require* acceleration and indeed *Bay Area* makes it clear that

the mere *right* to accelerate, as opposed to the actual decision to accelerate, does not cause the statute of limitations to accrue on future payments. *See Bay Area*, 522 U.S. at 208-09, 118 S. Ct. at 552 ("The general rule [that each missed payment creates a separate cause of action with its own limitations period] applies even though a plan has the option to accelerate and collect the entire debt if the employer defaults.") Thus, the mere fact that a default occurs does not require acceleration and does not start the statute of limitations running. If it did, then the statute would have run as to all missed payments in *Bay Area* because once the employer missed the first payment, it was in default, and the plan had the *right* to accelerate.

The *reason* for the default (for example, the shutdown of operations) is also not determinative of when the statute runs. As this Court stated, "the statutory acceleration provision is by its terms permissive." *Id.* Further, this Court noted that it is up to the plan to decide to accelerate but that the plan "need not do so to preserve the plan's right to recover future payments." *Id.* Also, this Court reasoned that such a holding is consistent with the general rule that a creditor may refrain from exercising the acceleration option and under those circumstances the statute runs from the date of each missed payment. *Id.* This Court's holding that the cause of action does not accrue absent acceleration is conditioned neither on the cause of the default nor on the *reason* why the plan chooses not to accelerate. Indeed, the ~~statutory~~ provision providing that the plan may accelerate applies not just to the section that makes missing a payment a default, but applies equally to the provision that makes "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability" a default. *See* 29 U.S.C. § 1399(c)(5).

The circumstances that the Seventh Circuit envisions would create anticipatory repudiation are precisely those

situations that "indicate[] a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5). Under the statute and under *Bay Area*, the *permissive* nature of acceleration applies not just to a situation where an employer misses a payment, but also to any other situation constituting a default. The *reason* for a default, whether it be a missed payment, a bankruptcy filing, or the shutdown of the employer, makes no difference under the language of the statute.

As a result, the Seventh Circuit is incorrect in stating that *Bay Area* does not apply merely because *Bay Area* does not "suggest that the only way in which the payor in a contract can default is by failing to pay when payment becomes due." App. A at 4a. The statute defines the term default. It defines a default as either a missed payment or any other event defined under the plan as a default (notably leaving the decision as to what constitutes a default to the plan). It also defines the consequences of a default, namely, that a plan *may*, but is not required to, accelerate. To hold that the doctrine of anticipatory repudiation constitutes another instance of default when the statute specifically defines default therefore conflicts with the statute. Further, to hold that the *consequences* of default through anticipatory repudiation (*i.e.*, that the cause of action for the entire payment schedule accrues) are different than the consequences that are defined in the statute for a default (*i.e.*, that the plan *may*, but need not, accelerate, and if it does not, the cause of action accrues separately from the date of each missed payment) conflicts with the statute.[6]

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[6] Nor does the fact that the panel states that this Court in *Bay Area* "assimilate[d] statute of limitations issues under the Multiemployer Pension Plan Amendments Act to the legal principles generally applicable to statutes of limitations issues", App. A at 4a, change the result. In *Bay Area*, this Court examined the general rule to supplement its reading of the statute. This Court rejected the Seventh Circuit's holding in *Navco*

IV. NEITHER A WITHDRAWAL NOR A CESSATION OF OPERATIONS CONSTITUTES A DEFAULT

The Seventh Circuit also held that the "[c]omplete cessation of operations" caused a withdrawal and therefore constituted a default. App. A at 9a. This holding cannot be squared with the statutory language or *Bay Area*. As *Bay Area* holds, a mere withdrawal does not cause the cause of action to accrue because the plan does not have a cause of action until the employer misses a payment. *Id.* at 201, 118 S. Ct. at 549. Perhaps the Seventh Circuit meant that it was the cessation of operations that caused a default. However, this cannot be true because that would put an employer that withdraws as the result of a cessation of operations in an automatic default merely for withdrawing.

Indeed, the statutory language defines a complete withdrawal as, among other things, the cessation of all *covered* operations, not the cessation of all operations. *See* 29 U.S.C. § 1383(a)(2). That is, what triggers a complete withdrawal is the employer ceasing to do that part of its business for which it had employees that participated in the plan. So it is simply incorrect to assume that an employer that ceases *covered* operations will not be able to pay withdrawal liability (and thus anticipatory repudiation occurs) because substantially all of its non-covered operations may still be (and often are) ongoing.

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that the language of the statute required a result different from the general rule. Here, the statute defines both default and the consequences of default (*i.e.*, permissive acceleration). The statute itself provides the answer as to what constitutes default and the consequences that flow from default. It is thus contrary to the statutory language to include a new ground of default and a different consequence of default (automatic acceleration). Nothing in *Bay Area* suggests that a general rule regarding anticipatory repudiation may be applied in derogation of the statutory text.

V. THE RIGHT TO ARBITRATION PREVENTS ACCELERATION

The Seventh Circuit's statement that "the right to arbitration presupposes that the cause of action has already arisen", App. A at 9a, is contrary to the statute and *Bay Area*. In *Bay Area*, this Court rejected this position and held that "the statute does not begin to run on withdrawal liability until a scheduled payment is missed." *Id.* at 195, 118 S. Ct. at 546. Instead, "withdrawal 'merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment.'" *Id.* at 201-02, 118 S. Ct. at 549 (quoting *Joyce*, 871 F.2d at 1124). It is the routine issuance of the notice and demand that starts the clock running for a request for review and arbitration. *See* 29 U.S.C. §§ 1399(b) and 1401(a). An employer may request review and arbitration while paying according to the schedule. Indeed, MPPAA requires such payments notwithstanding a request for review or arbitration under its "pay now, dispute later" scheme. *See, e.g., Wintz Properties*, 155 F.3d at 876. Thus, the employer's right to arbitration in no way indicates that a cause of action has accrued. For example, assume that the employer makes all payments according to schedule (as should be done) while arbitration is ongoing. A cause of action has not accrued because the employer has not missed a payment.

The Seventh Circuit acknowledged that in *Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 533-34 (7th Cir. 1997), the Seventh Circuit itself held that a plan may not accelerate the payment schedule while arbitration is pending. It is not that the employer does not have a "duty to pay" or that the right to payment is "suspended," as the Seventh Circuit stated. App. A at 9a. Rather, a plan may not *accelerate* during this period. As stated above, the mere fact that arbitration is ongoing does not mean that a cause of action has accrued.

For a cause of action to accrue, the employer must miss a payment. Further, as *Bay Area* holds, missing a payment means that the statute begins to run with respect to *that particular payment*, not the entire schedule. Because acceleration is precluded under the statute and the Seventh Circuit's own *Century Motor Freight* decision, it cannot be said that the cause of action for the whole schedule accrues on the date that the first payment is missed.

An example highlights this fact. As the Seventh Circuit notes, a payment schedule under MPPAA can last for up to 20 years. App. A at 12a. Assume that the employer initiates arbitration and that it misses the first payment under a schedule lasting 20 years. Because arbitration is pending, the plan cannot accelerate the payment schedule. Yet under the Seventh Circuit's reasoning, the cause of action has accrued, and thus the statute is running, with respect to the whole payment schedule. Assume further that the arbitration proceeding lasts seven years. By now, under the Seventh Circuit's reasoning, the statute has run with respect to the whole schedule (even with respect to payments that were due well into the future but could not be accelerated due to the arbitration). Under this reasoning, the statute has run on the whole schedule even though the plan *never had the right* to sue to get the payments (because the plan could not accelerate) that were not due until the future (*i.e.*, the payments that were due more than six years after the first payment was due). Without the right to sue for those payments, it cannot be said that the cause of action for those payments has accrued.

VI. BOTH THE STATUTE AND *BAY AREA* MAKE DEFAULT DISTINCT FROM ACCELERATION

The Seventh Circuit's proposition that the plan has the right to accelerate and that therefore the only question is whether there is a default is contrary to the statutory language

and *Bay Area*. Default is a *sine qua non* for acceleration. However, as *Bay Area* makes clear, default only gives the plan the *right* to accelerate; default is a necessary, but not sufficient, condition for acceleration. In the absence of acceleration, the cause of action accrues separately from the date of each missed payment. 522 U.S. at 208-09, 118 S. Ct. at 552. The Seventh Circuit incorrectly conflates default with acceleration. However, "[l]ike the typical installment creditor, the plan has no right, absent default *and acceleration*, to sue to collect payments before they are due, *and it has no obligation to accelerate on default.*" *Id.* at 210, 118 S. Ct. at 553 (emphases added). The Seventh Circuit never states that Central States exercised its *right* to accelerate. Rather, all it found is that a default occurred. But a default standing alone (regardless of the reason for the default) is not enough for the cause of action to accrue. Indeed, the Seventh Circuit recognized that Central States "demanded payment on the installment plan." App. A at 10a. The question is not, as the Seventh Circuit believed, whether Central States thought a default occurred, but rather whether Central States exercised the acceleration option. However, issuing the notice and demand with an installment schedule shows that acceleration was not intended. Otherwise, it would be impossible to distinguish exercise of the acceleration option from demand for payment in installments since the panel would need to equate the two for the notice and demand in this case to be treated as acceleration.

VII. THE STATUTE DID NOT BEGIN TO RUN ON THE DATE OF THE ANTICIPATORY REPUDIATION

The Seventh Circuit's holding that the statute began to run with respect to the entire payment schedule because the "standard rule" is that the promisee may immediately sue once anticipatory repudiation occurs is contrary to the statutory language, *Bay Area*, and indeed the general rule

regarding anticipatory repudiation. First, as argued above, to the extent the doctrine of anticipatory repudiation has any role to play under the statute, it is covered under 29 U.S.C. § 1399(c)(5)(B). However, under this section, acceleration is still permissive. It is contrary to both the statute and *Bay Area* (which holds that the mere right to acceleration does not make the cause of action accrue with respect to the entire payment schedule) to hold that the cause of action accrues with respect to the whole payment schedule merely because of the *right* to acceleration as opposed to acceleration itself.

Second, the Seventh Circuit is incorrect in holding that Central States had not completely performed its side of the "contract" because it is still obligated to pay pensions. App. A at 6a. By doing so, the Seventh Circuit attempts to avoid the exception to the anticipatory repudiation doctrine that makes it inapplicable when one party has completely performed its side of the contract. *See Smyth v. United States*, 302 U.S. 329, 356, 58 S.Ct. 248, 253 (1937) (doctrine of anticipatory breach has in general no application to unilateral contracts); *New York Life Ins. Co. v. Vislas*, 297 U.S. 672, 680, 56 S.Ct. 615, 619 (1936) (party that no longer has obligation to perform may be compelled to wait for installments as they mature). Withdrawal liability is imposed by statute and does not depend upon an agreement between a plan and the employer to pay withdrawal liability. Additionally, a plan must provide the pensions even if the employer never withdraws from the plan, withdraws from the plan and owes no withdrawal liability, or withdraws from the plan and fails to pay withdrawal liability. There is no linkage or interdependence—by contract, by statute or otherwise—between the employer's obligation to pay withdrawal liability and the plan's obligation to pay pensions. Thus, it cannot be said that "performance" by a plan is contingent upon payment of withdrawal liability. Indeed, payment of the pensions is not even contingent upon payment of the contributions that are to

fund the pensions. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989) (*en banc*).

Nor does the Seventh Circuit's decision recognize that the doctrine of anticipatory repudiation has no application to the payment of money only. *Smyth*, 302 U.S. at 356, 58 S.Ct. at 253; *Roehm v. Horst*, 178 U.S. 118, 20 S.Ct. 780, 787 (1900) (court notes that money contracts stand on different footing from other contracts for purposes of the anticipatory repudiation doctrine). The Seventh Circuit noted that acceleration clauses "are inserted to fill a hole in the law of contracts" that would be unnecessary "if not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation." App. A at 6a. The Seventh Circuit apparently believed that it was patching this "hole" in the law of contracts by disregarding the completed performance rule. However, the statute itself provides for acceleration at the option of the plan. Thus, there is no gap to fill. Instead, the Seventh Circuit's holding merely strips away the discretionary nature of acceleration. Further, the doctrine simply has no role to play in this context because the doctrine was developed to prevent the circumstance where the non-breaching party would be forced to perform under a contract even though the other party gave notice of an intention to breach. Here, there is no additional performance required by the pension plan.

Even under the doctrine of anticipatory repudiation, the payee has the choice of suing at the time of the anticipatory repudiation or waiting until the time of performance and then suing. If the party chooses to wait until the time of performance, the statute of limitations does not begin to run until the *time of performance*, not the time of the *anticipatory repudiation*. *See, e.g., Franconia Assocs. v. United States*, 240 F.3d 1358, 1363-65 (Fed. Cir. 2001) ("the normal rule is that the statute of limitations begins to run from the date of

performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation"); *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 272 n.35 (Ct. Cl. 1965) ("the majority of courts in this country hold that the statute of limitations begins to run on the date specified in the contract for performance unless the injured party elects to sue prior to that date for the anticipatory breach"); *White v. Prenzler*, 131 N.E.2d 540, 543 (Ill. 1956) (citing Restatement (First) of Contracts § 322) (same).

The general rule that the payee has the right to wait until the time of performance to sue and that the statute of limitations does not run in the interim is entirely consistent with the statutory language and *Bay Area* because both leave it to the plan (the payee) to decide whether to accelerate. Under the statute and *Bay Area*, the mere *right* to accelerate does not cause the statute to run as to the entire payment schedule. Similarly, under the doctrine of anticipatory repudiation, the mere *right* to declare an anticipatory repudiation does not cause the statute to run. To the extent that the doctrine of anticipatory repudiation has any role to play in this context, it must be applied in a manner consistent with the statute and *Bay Area*. The general rule is consistent with both. The Seventh Circuit's rule is contrary to both, and converts a doctrine that was intended to protect a payee into a trap for the unwary.[7]

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[7] Even assuming that the language of Section 1399(c)(5) (and its construction by this Court in *Bay Area*) does not foreclose the use of the doctrine of anticipatory repudiation, it is certain that the doctrine may not contradict the statute, and to the extent that Congress would desire the Court to supplement the statute with the doctrine, we must assume that Congress wants the Court to apply the doctrine consistent with the general rule in the absence of indicia to the contrary. If anything, the language of Section 1399(c)(5) indicates that applying the doctrine contrary to the general rule would be contrary to the statute itself.

VIII. ALLIED'S INABILITY TO PAY DOES NOT CONSTITUTE REPUDIATION BECAUSE ALL TRADES OR BUSINESSES UNDER COMMON CONTROL ARE JOINTLY AND SEVERALLY LIABLE FOR PAYMENT

Finally, even if the doctrine of anticipatory repudiation applies in exactly the manner stated by the Seventh Circuit, the Seventh Circuit need not rely on "commercial miracles" nor "traffic in the miraculous", App. A at 12a, to find that the conditions for anticipatory repudiation were *not* satisfied in this case. MPPAA makes the "employer", which is defined as *all* trades or businesses under common control, jointly and severally liable for withdrawal liability payments. App. A at 3a; 29 U.S.C. § 1301(b)(1). As consistently held by the various courts of appeals, notice to one controlled group member is notice to all. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992). Even if it can be assumed as a matter of law that due to its cessation of operations in bankruptcy *Allied* could not make the payments, it cannot be assumed as a matter of law that *none* of the members of the controlled group could make the payments. Indeed, this case was filed to collect the withdrawal liability payments from numerous defendants who are alleged to be in the controlled group, *none* of whom were in the Allied bankruptcy. Thus, even if it was established that Allied could not make the withdrawal liability payments, it was not (and cannot be) established that the "employer" (consisting of *all* trades or businesses under common control) could not pay. Therefore, it has not been established as a matter of law that an anticipatory repudiation occurred because other members of the controlled group do have the ability to pay.

CONCLUSION

The Seventh Circuit's application of the doctrine of anticipatory repudiation in this context is contrary to both the statutory language and *Bay Area*. The clarity brought by *Bay Area* to the statute of limitations analysis under MPPAA has been lost. Under the Seventh Circuit's holding, pension plans and employer's will end up litigating a hopeless morass of questions related to the doctrine of anticipatory repudiation. Anticipatory repudiation is common law contract doctrine completely foreign to the carefully crafted statutory scheme for determining when a cause of action for withdrawal liability accrues, and the statute of limitations begins to run. Further, even if the doctrine applies, it does not make a cause of action accrue earlier than the time for performance (or require acceleration) in the absence of an election by the payee. Just as the statute leaves acceleration to the discretion of the plan (leaving the doctrine of anticipatory repudiation no role to play), the doctrine of anticipatory repudiation leaves it to the plan (the payee) whether to await performance or to sue based upon the anticipatory repudiation. The Seventh Circuit's holding strips a plan of the discretion conferred by the statute and creates uncertainty as to when the cause of action accrues. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-3920.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

Argued May 8, 2001.
Decided June 5, 2001.

Before BAUER, POSNER, and COFFEY, *Circuit Judges*.

POSNER, *Circuit Judge*.

The Multiemployer Pension Plan Amendments Act, 29 U.S.C. §§ 1301 *et seq.*, requires an employer that withdraws from a plan which is not overfunded to pay a "withdrawal liability" calculated to avoid shifting the cost of that employer's pension obligations to the other employers. E.g., *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-17, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995); *Central States, Southeast & Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 204 F.3d 736, 739 (7th Cir. 2000); *Central States, Southeast & Southwest Areas Pension Fund v. Creative Development Co.*, 232 F.3d 406, 408-09 (5th Cir. 2000). The district court dismissed this suit by the Central States multiemployer pension plan for payment of withdrawal liability as barred by the Act's six-

year statute of limitations. 29 U.S.C. §1451(f). A brief chronology will aid in focusing the issue.

On June 22, 1989, a trio of affiliated corporations (collectively "Allied Grocers"), employers that were members of the Central States plan, declared bankruptcy under Chapter 11 of the Bankruptcy Code. According to Central States, the declaration of bankruptcy entitled it, under the terms of the multiemployer plan, to declare that Allied was in default of its withdrawal liability obligations, though it had not yet actually withdrawn from the plan. The statute defines "default," so far as bears on this case, as "any . . . event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5)(B). Central States' plan makes an employer's declaration of bankruptcy a default. And under the statute a default entitles a plan to "require immediate payment of the outstanding amount of an employer's withdrawal liability." § 1399(c)(5); *Board of Trustees v. Kahle Engineering Corp.*, 43 F.3d 852, 854 (3d Cir. 1994).

On May 18 of the following year, with the Allied bankruptcy still pending, Central States filed a proof of claim in the bankruptcy proceeding, claiming that Allied owed it a withdrawal liability obligation of some $752,000 and setting forth an installment schedule on which it wanted to be paid. Two weeks later, on June 2, Allied ceased operations, a move that effected, as a matter of law, its complete withdrawal from the plan. § 1383(a)(2); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 196, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997); *Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1341-42 (7th Cir. 1995). Two weeks after that, on June 18, 1990, the plan sent Allied a notice, and demand for payment, of withdrawal liability in the exact amount of the proof of claim in the

bankruptcy proceeding, to be paid in 14 equal monthly installments, the first due on August 1—just as requested in the proof of claim. The record is silent on whether the automatic stay was lifted to permit Central States to make a demand outside of bankruptcy; later we'll see that it is uncertain whether the stay must be lifted to permit such a demand.

On December 27, 1995, Central States and Allied settled the dispute over Allied's withdrawal liability, agreeing that it was $526,000, which became a nonpriority unsecured claim in the bankruptcy. The record is silent on whether any part of the claim was ever paid or whether Allied emerged from its Chapter 11 bankruptcy as an operating company.

Central States brought this suit on July 31, 1996, not against Allied but against Basic American Industries, Inc. and other companies under common control with Allied and therefore jointly and severally liable for Allied's withdrawal obligation. 29 U.S.C. § 1301(b)(1). Some defendants were added later by an amended complaint and there is an issue whether the original defendants were served with process in a timely fashion, but we can avoid these matters and confine our attention to the statute of limitations issue. The suit seeks the same amount as the proof of claim filed in the Allied bankruptcy proceeding and the demand for payment from Allied made by Central States in June of 1990. (There is no suggestion, as yet anyway, that the settlement with Allied capped Central States' claim against the affiliates.) The suit was filed more than six years after the proof of claim, the complete withdrawal by Allied from the plan, and the demand for payment, although less than six years after the first and all subsequent installment payments of Allied's withdrawal liability were due. Central States argues that the statute of limitations did not begin to run for the first of the installments until Allied failed to pay it on August 1, 1990, and for the later installments until their due dates passed without payment.

Central States fastens on the Supreme Court's statement in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., supra*, 522 U.S. at 195, 118 S.Ct. 542, that the MPPAA's six-year statute of limitations does not begin to run "until the employer fails to make a payment on the schedule set by the fund," and, as a backup, on the further statement in that opinion that "each missed payment [of an MPPAA installment obligation] creates a separate cause of action with its own six-year limitations period." *Id.* The first statement, as the Court's opinion makes clear, is limited by its context, which did not include bankruptcy. The employer in *Bay Area* ceased operations and withdrew from the plan, whereupon the plan computed the employer's withdrawal liability and demanded payment of it in installments on specified dates. The plan's cause of action accrued, the Supreme Court held, when the employer failed to make the first payment on time. The plan could not have sued earlier because until then the employer had not defaulted on its withdrawal obligation. And since the plan did not invoke the default as a basis for accelerating the due dates of the subsequent installments, those installments were not defaulted until their due dates arrived and the employer again failed to pay. In so holding, the Court expressly rejected (*id.* at 206, 209-10, 118 S.Ct. 542) the contrary view that we had expressed in *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171-72 (7th Cir.1993).

The Court did not suggest and it would have been contrary to the thrust of its opinion, which (again rejecting our position in *Navco*, see 522 U.S. at 208-09, 118 S.Ct. 542) was to assimilate statute of limitations issues under the Multi-employer Pension Plan Amendments Act to the legal principles generally applicable to statutes of limitations issues, *id.* at 195, 208, 210, 118 S.Ct. 542, to suggest that the only way in which the payor in a contract can default is by failing to pay when payment becomes due. One way is by repudiating the obligation to pay; anticipatory repudiation is a

breach of contract that entitles the payee to sue without waiting for the date when payment was due to come and go. E.g., *Roehm v. Horst*, 178 U.S. 1, 18-19, 20 S.Ct. 780, 44 L.Ed. 953 (1900); *Wisconsin Power & Light Co. v. Century Indemnity Co.*, 130 F.3d 787, 793 (7th Cir.1997); *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 245 (D.C. Cir. 1995); E. Allan Farnsworth, *Contracts* §§ 8.20-.23 (3d ed.1999). There is an exception: if the payee has completely performed his side of the contract and is just awaiting payment, he can't declare a breach and sue for immediate payment just because he has reason (even compelling reason) to doubt that the other party will pay when due. E.g., *Roehm v. Horst, supra*, 178 U.S. at 17-18, 20 S.Ct. 780; *Restatement (Second) of Contracts* § 243(3) (1981); Farnsworth, *supra*, § 8.20, pp. 602-03 (3d ed. 1999). The idea behind this dubious rule seems to be that, having performed, the payee can no longer protect himself against nonpayment by suspending performance. In other words, anticipatory repudiation (sometimes called anticipatory breach) is conceived of primarily as a trigger of a contract party's right of self-help, like the breach of a condition in a contract. *See C.L. Maddox, Inc. v. Coalfield Services, Inc.*, 51 F.3d 76, 81 (7th Cir. 1995); *First National Bank v. Continental Illinois National Bank & Trust Co.*, 933 F.2d 466, 469 (7th Cir. 1991); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 599 (7th Cir. 1986); Farnsworth, *supra*, § 8.20, p. 600.

Why the doctrine of anticipatory repudiation should be so limited eludes our understanding. Announcement by the other party that he has no intention of paying should entitle the prospective victim of the payor's breach to take immediate steps to protect his interest, as by suing. Against this it has been argued that the doctrine of anticipatory repudiation "will not intercede to rescue the promisee from the consequences of the absence of an acceleration clause." *Rosenfeld v. City Paper Co.*, 527 So.2d 704, 706 (Ala. 1988);

cf. *First State Bank v. Jubie*, 86 F.3d 755, 760 (8th Cir. 1996). That gets it backwards. Acceleration clauses are inserted to fill a hole in the law of contracts, which has failed here in its traditional and important function of interpolating rights and duties that the parties can be expected to negotiate for, e.g., *In re Modern Dairy of Champaign, Inc.*, 171 F.3d 1106, 1108 (7th Cir. 1999), and thus of economizing on the costs of transacting. Acceleration clauses are a standard contract provision for protecting the payee against the consequences of a breach by the other party; they would be unnecessary were it not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation. In any event, the exception is inapplicable here because the Central States plan continues to be obligated to pay the pensions of Allied's former employees.

Our disapproved *Navco* case had involved, in fact, both bankruptcy and repudiation; but these features of the case had played no role in our analysis (which was based on an interpretation of the MPPAA) and were neither involved nor mentioned in *Bay Area*. There is nothing in the latter decision to suggest that they are immaterial. All *Bay Area* holds or implies, at least so far as the present case is concerned, is that withdrawal from the plan is not an automatic default of the obligations that such withdrawal imposes and neither is missing one installment payment of withdrawal liability a default of the entire withdrawal liability. There is nothing in the opinion or its logic to suggest that the principles of anticipatory repudiation have no role to play under the MPPAA, unless those principles were stretched so far out of shape that, for example, failure to make a single installment payment were deemed repudiation per se of the entire obligation.

So we proceed to the question whether there was in fact a repudiation here and if so when it occurred. Filing for

bankruptcy, though by virtue of the automatic stay it prevents the payee from invoking the usual remedies for breach of contract, 11 U.S.C. § 362; *Buckley v. Bass & Associates*, 249 F.3d 678, 680 (7th Cir. 2001), and enables the contract if still executory to be rescinded by the trustee in bankruptcy (or debtor in possession, if, as in this case at the relevant time, there is no trustee), § 365(a), is not anticipatory repudiation per se. For the trustee or debtor in possession can affirm the contract even if it contains a clause (a so-called "ipso facto" clause) that makes filing for bankruptcy a ground for termination. § 365(e)(B); *Lyons Savings & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387, 393 n. 6 (7th Cir. 1987); *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 17 (1st Cir. 1993). Affirmance is the opposite of repudiation, and the affirmance option thus makes it impossible to consider the declaration of bankruptcy itself, whether or not there is an ipso facto clause, a repudiation of a creditor's claim.

If the trustee or debtor in possession exercises the discretion that the Code gives him to reject the contract, that of course is repudiation. *See Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 589-90, 36 S.Ct. 412, 60 L.Ed. 811 (1916). But Allied, when in June 1989 it declared bankruptcy, didn't repudiate its withdrawal liability. It was still making contributions to the fund and there was a possibility that it would regain its financial footing (remember that it filed for reorganization under Chapter 11, not liquidation under Chapter 7). It might never withdraw from the fund and even if it did it might still be able to pay the withdrawal liability. Indeed, it did not yet *have* any withdrawal liability, for that liability attaches only when the employer "completely withdraws" from the multiemployer plan, 29 U.S.C. § 1381(a), which occurs only when he either "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered

operations under the plan." § 1383(a); *see Corbett v. MacDonald Moving Services, Inc.*, 124 F.3d 82, 84 (2d Cir. 1997); PBGC Opinion Letter 87-1, 1987 WL 68403 (Jan. 23, 1987). Merely filing for the protection of the bankruptcy court is not a repudiation of obligations or a cessation of operations. More broadly, insolvency, with or without a declaration of bankruptcy, does not equal dissolution. An insolvent firm is not necessarily out of business, and the parties with which it has contracts cannot automatically assume that the firm will default, Farnsworth, *supra*, § 8.21, p. 608 n. 16 and § 8.23, p. 613; *Martin v. Maldonado*, 572 P.2d 763, 770 n. 22 (Alaska 1977); *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639, 647 (1971); *Restatement (Second) of Contracts, supra*, § 252 comment a, although insolvency can of course be a very ominous signal, entitling a creditor to demand security. E.g., *id.*; *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co., supra*, 484 P.2d at 647; cf. UCC 2-609.

The plan in this case contains an ipso facto clause. For it permits Central States to treat a member's declaration of bankruptcy as a default upon the occurrence of which "the outstanding amount of the withdrawal liability shall immediately become due and payable." The defendants' argument that the clause was even more—was a Doomsday Bomb *requiring* Central States, whether it wanted to or no, to treat the declaration of bankruptcy as a default—is contrary to the plan's terms, which are permissive rather than mandatory, cf. *Greenhouse Patio Apartments v. Aetna Life Ins. Co.*, 868 F.2d 153, 155-56 (5th Cir. 1989), and is bad policy as well, for reasons stated in *Board of Trustees v. Kahle Engineering Corp., supra*, 43 F.3d at 859 and n. 7. (Briefly, declaring a default may, by increasing the bankrupt's obligations, make it more difficult for the bankrupt to regain its financial footing and pay off the claims against it.) But even read permissively, the default clause in the Central States plan is an ipso facto

clause; and it is highly doubtful in light of the cases and considerations marshaled above that the MPPAA authorizes such clauses.

So by filing a proof of claim for the entire withdrawal liability that Allied would owe if it withdrew (remember that the declaration of bankruptcy was not itself a withdrawal), Central States was jumping the gun. No withdrawal liability had yet arisen or could be precipitated by the bankruptcy (because ipso facto clauses are unenforceable). Neither in June 1989 when Allied filed for bankruptcy, nor May 18 of the following year when Central States filed its proof of claim, had a cause of action for withdrawal liability arisen. The statute of limitations therefore did not begin to run on either date.

But it did begin to run—still more than six years before Central States sued—no later than June 18, 1990, when, Allied having ceased operations on June 2, Central States served on Allied a formal demand for payment of the withdrawal liability set forth in the proof of claim that it had filed in the bankruptcy proceeding. Complete cessation of operations precipitates, as we have seen, the employer's (and any affiliates') withdrawal liability. That was the default, and the demand determined its amount (before that determination, a suit would have been premature). It is true that Central States could not insist on *immediate* payment until the employer had a chance to invoke its right to arbitrate the amount of its withdrawal liability. 29 U.S.C. § 1401; *Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 533 (7th Cir. 1997). Allied's duty to pay Central States would have been suspended by virtue of this rule until December 25, 1990, but the cause of action did not arise then--the right to arbitration presupposes that the cause of action has already arisen and has now to be adjudicated.

As a detail, we note that although "demanding" payment from a debtor in bankruptcy other than in the bankruptcy proceeding itself is normally a violation of the automatic stay, the demand for payment of withdrawal liability is probably an exception to this principle. *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372, 1375-76 (7th Cir. 1992). As a further detail, we note that it is arguable that the statute of limitations actually began to run earlier than June 18, on June 2, since Central States had already computed the withdrawal liability and sent notice of the amount, via the proof of claim, to Allied, substantially complying with the statutory requirement for notice of and demand for withdrawal liability. 29 U.S.C. § 1399(b)(1); *Central States, Southeast & Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 453 (7th Cir. 1992). But this we need not decide, as the decision would not affect the outcome of the case.

Surprisingly, Central States has failed to make the strongest argument available to it for the timeliness of the suit, which is that the fact that it demanded payment on the installment plan shows that it didn't think Allied had defaulted. But the argument would not have succeeded even if it had been made. The statute *required* Central States to formulate an installment plan. § 1399(b)(1); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 196, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997). And the reason for the requirement has nothing to do with determining when a default has occurred. The reason is that Congress conceived of withdrawal liability as a substitute for the annual payments that the employer would have made to the multiemployer pension fund had he not withdrawn. *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., supra*, 513 U.S. at 418-19, 115 S.Ct. 981; H.R.Rep. No. 96-869, 96th Congress, 2d Sess., 1980 U.S.C.C.A.N. 2918. The Supreme Court made clear in *Bay Area* that the statutory

requirement does not prevent the fund from accelerating all future payments upon default, 522 U.S. at 210, 118 S.Ct. 542, thus making all the installments due at once. *See* also *Board of Trustees v. Kahle Engineering Corp., supra*, 43 F.3d at 857, 861.

So the only question is whether there was a default. There was. When Allied ceased operating, Central States knew it would never see any of the scheduled installment payments. It had an unsecured claim, so Allied could not make any of the installment payments without violating the absolute priority rule of 11 U.S.C. § 1129(b). With fewer assets than claims, Allied would certainly pay the fund less than the full value of its claim. The best the fund could hope for was a partial settlement of the withdrawal liability. It should therefore have concluded on June 2, 1990, that Allied had repudiated its withdrawal liability. Put differently, on that day it became clear that Allied had disabled itself from paying the withdrawal liability. The standard rule in contract law is that the promisee is free to sue for anticipatory repudiation as soon as the promisor has disabled itself from performing its contractual obligations. *See, e.g., Restatement (Second) of Contracts, supra*, § 250(b). All that remained to complete the cause of action was to determine the amount due, which happened, at the very latest, on June 18, more than six years before the suit was brought.

Central States argues finally that even if it could not, by reason of the statute of limitations, sue to recover the payment due on August 1, 1990, a suit or suits for the subsequent installments was not barred. But there is no relevant difference among the installments. All specified payments on dates within the six-year limitations period; if as we have just held a suit to collect the first installment nevertheless was barred by reason of acceleration, so were suits to collect all the subsequent ones.

We are not such skeptics as to deny the possibility of commercial miracles. Even if it seemed certain on June 2, 1990, that Allied would not be able to pay the first installment of its withdrawal liability due two months later, there was always the chance that, say, 16 months later, when the last installment was due, Allied would have had a miraculous recovery and could pay at least that installment. For all we know, it *has* had a miraculous recovery; the record is silent on whether and in what condition Allied emerged from bankruptcy. But all that is irrelevant. For it is unquestioned that if there was a default on June 2 or 18, Central States was entitled to accelerate the due date of all the installments to the present; the fourteenth installment became due immediately. Anyway the doctrine of anticipatory repudiation does not traffic in the miraculous. A breach occurs when it is reasonably certain that the other party is not going to meet its obligations under the contract in timely fashion. At that point the potential victim is freed from its own contractual obligations and authorized to take all reasonable self-protective measures, including suing. It is not required to twiddle its thumbs for 20 years (the maximum installment period under the MPAA, 29 U.S.C. § 1399(c)(1)(B), though the period here was only 14 months), while its prospects of recovering what it is owed ooze away. The point at which Central States knew that Allied was not going to meet its obligations (and also knew how much those obligations were) was reached no later than June 18 and required Central States to sue within six years of that date, which it failed to do.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 97-3794

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INCORPORATED, WATERFRONT DEVELOPMENT COMPANY, INCORPORATED, EFB DEVELOPMENT COMPANY, INCORPORATED, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 96 C 4736, Blanche M. Manning, Judge

February 27, 1998

ORDER

Before Hon. Richard A. Posner, *Chief Judge*
Hon. William J. Bauer, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

On consideration of the "DEFENDANTS-APPELLEES' SEVENTH CIRCUIT RULE 3(c)(1) DOCKETING STATEMENT" filed on November 13, 1997, in which the

appellees contend that this appeal is premature and the court is without jurisdiction, and the "PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANTS-APPELLEES' SEVENTH CIRCUIT RULE 3(c)(1) DOCKETING STATEMENT filed on December 8, 1997.

IT IS ORDERED that this appeal is DISMISSED. In its minute order of September 30, 1997, the district court granted defendants' motion to dismiss the first amended complaint, stating that "[a] detailed order will be filed on or before October 31, 1997 setting forth the reasons therefor." The district court, to date, has not issued an order explaining the reasons for its dismissal, *see* Circuit Rule 50, and has not entered a Rule 58 judgment. *See Smith v. Village of Maywood*, 970 F.2d 397, 400 (7th Cir. 1992) ("One of the purposes of this requirement [Rule 58] is to ensure that the parties and the appellate court can be certain about the proper timing of an appeal."). Plaintiffs are not harmed by dismissal of this appeal because they may file a new appeal (if they choose to proceed in this court) after the district court has stated its reasons for dismissal of the first amended complaint and entered its judgment in compliance with Federal Rule of Civil Procedure 58. *See Otis v. City of Chicago*, 29 F.3d 1159, 1162-66 (7th Cir. 1994) (en banc) (a party can always wait until compliance with Rule 58 before appealing, even though he could have appealed earlier.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

96 C 4736
Hon. Blanche M. Manning

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL,
Plaintiffs,

v.

BASIC AMERICAN INDUSTRIES, INC., *et al.*
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on: (1) Plaintiffs Central States, Southeast and Southwest Areas Pension Fund's and Howard McDougal's (collectively, "Central States") motion to alter or amend this court's December 13, 1997 ruling [17-1]; (2) Defendants' motion to dismiss the first amended complaint [20-1]; and (3) Defendants' motion to vacate this court's November 26, 1996 Order and to dismiss the Plaintiffs' complaint [23-1]. For the reasons that follow, Plaintiffs' motion is denied and Defendants' motions are granted.

BACKGROUND

Central States, a multiemployer pension plan, brought this ERISA action to collect alleged delinquent withdrawal liability from Defendants, incurred when a non-party, Allied Companies, Inc., withdrew from Central States. The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), permits an underfunded multiemployer pension

plan to pursue a withdrawing employer for a portion of the plan's deficit. 29 U.S.C. § 1381.

Central States filed its initial complaint on July 31, 1996 against certain Defendants defined as the "Allied Control Group." On November 22, 1996, Plaintiffs filed an *ex parte* Motion to Extend Summons for 45 days, which was granted by this court on November 26, 1997, without argument from Defendants. By January 6, 1997, Central States completed service on the following Defendants: Basic American Industries, Inc.; Jackson's Realty & Builders Co.; C&B Wood Suppliers. Inc.; E&F Realty Co.; Waterfront Development Co.; EFB Development Co.; Turtle Creek Investment Co.; Liquid Oil Growers Organization, Inc.; Southwest Agri-Development Specialists, Inc.; and Brady R. Justice (collectively, the "Initial Defendants").[1]

On December 20, 1996, Central States filed its First Amended Complaint, naming the following additional Defendants: EFB Development Co.; Sanibel Development Co.; Sanibel Investment Co.; Turtle Creek of Tennessee; Hato Rey Professional Arts, Inc.; Turtle Creek North Apartments; Village Green Apartments; Turtle Creek Apartments of Kokomo; Turtle Creek Apartments of Frankfort; Turtle Creek Apartments of Connersville; Turtle Creek Apartments of Marion; Roxbury Square, Ltd.; Turtle Creek of Indiana; Wheel Estates; EFB Coal Co.; Horn AG Services Inc.; Table Fresh Grapes, Inc.; Arizona Desert Growers; Desert Vineyards, Inc.; Red Mountain Products; the Racquets IV Tennis Club, Inc.; and Ronald Hicks (collectively, "the Moving Defendants").[2] The Moving Defendants were not

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[1] The Initial Defendants have brought the motion to vacate this court's November 26, 1996 Order and to dismiss the Central States' complaint, pursuant to Rule 4(m).

[2] The Moving Defendants have brought the Motion to Dismiss Central States' First Amended Complaint on statute of limitations grounds, pursuant to Rule 12(b)(6).

specifically named in the Plaintiffs' Original Complaint nor were they part of the entities that comprised the "Allied Control Group" as defined by Central States in its Original Complaint. All of the Moving Defendants were served with process on January 6, 1997, except for one who was served on January 10, 1997.

Both Central States' Original Complaint and First Amended Complaint allege that on August 1, 1990, the Initial Defendants and the Moving Defendants violated various ERISA sections when they "failed to pay [their] first payment of withdrawal liability." (First Amended Complaint at ¶ 52).

Subsequent to the filing of the First Amended Complaint, the litigants filed the following motions: (1) Central States moved to alter or amend this court's December 13, 1997 ruling denying Central States' second motion to extend time to serve Defendants Ethan and Franklin Jackson and dismissing the complaint without prejudice, pursuant to Rule 4(m) [17-1]; (2) Moving Defendants moved to dismiss the First Amended Complaint with respect to themselves on statute of limitations grounds, pursuant to Rule 12(b)(6) [20-1]; and (3) the Initial Defendants moved to vacate this court's November 26, 1996 Order granting Central States' motion for extension of time to serve the Initial Defendants and to dismiss the Plaintiffs' action as to themselves, pursuant to Rule 4(m) [23-1].

On September 30, 1997, this court issued a minute order denying Central States' motion and granting the Defendants' motions. This Memorandum and Order will more fully explain the reasons behind this court's September 30, 1997 minute order.

ANALYSIS

I. Moving Defendants' Motion to Dismiss on Statute of Limitations Grounds

A. Standard for a 12(b)(6) Motion to Dismiss

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all facts alleged in the complaint, construing the allegations liberally and viewing them in the light most favorable to the plaintiff. *See, e.g., McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989). Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1579 (7th Cir. 1991), citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The court will accept all well-pled factual allegations in the complaint as true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2 (1977). In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. *Craigs, Inc. v. General Electric Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993). However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiffs claims, *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir.1992).

B. ERISA Limitations

The MPPAA requires that when an employer withdraws from a multiemployer pension plan governed by ERISA, the plan must assess withdrawal liability against that employer for the unfunded cost of his employees' vested pension benefits. 29 U.S.C. § 1396. The purpose of the withdrawal liability is to avoid shifting the financial burden of the unfunded pension benefits to other employers in the plan or,

ultimately, the Pension Benefit Guaranty Corporation, the insurer of such benefits. *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1371 (7th Cir.1992). In order to assess withdrawal liability, the pension plan must issue a notice and demand for payment of the withdrawal liability. 29 U.S.C. § 1399(d). Thereafter, if the employer does not pay its liability within sixty days, the payment becomes overdue, and the plan may pursue a court action to collect it. 29 U.S.C. § 1399(c)(2); *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171 (7th Cir. 1993).

The Moving Defendants contend this action is barred by the relevant statute of limitations, 29 U.S.C. § 1451(f), which provides that an action for collection of withdrawal liability may not be brought after the later of "(1) 6 years after the date on which the cause of action rose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action maybe brought not later than 6 years after the date of discovery of the existence of such cause of action." The Seventh Circuit has held that for the purposes of § 1451(f), a cause of action arises "as soon as payment becomes overdue." *Navco*, 3 F.3d at 172. A payment becomes overdue sixty days after the date of demand for payment. 29 U.S.C. § 1399(c)(2); *Navco*, 3 F.3d at 171.

Here, the date of demand was on August 1, 1990. Thus, the payment at issue became overdue sixty days from August 1, 1990, on October 1, 1990, and Central States had six years from this date, until October 1, 1996, to bring its claims against the Moving Defendants. Accordingly, because the First Amended Complaint (the complaint in which the Moving Defendants were first named) was filed on December 20, 1996, the Court finds that Central States' action is

untimely with respect to the Moving Defendants and thus barred by the relevant statute of limitations, 29 U.S.C. § 1451(f).

C. Relation Back Under Rule 15(c)

Although a complaint may be barred by the applicable statute of limitations, Rule 15(c) of the Federal Rules of Civil Procedure creates an exception by allowing "the relation back of amendments changing or adding parties so long as no prejudice will ensue." *Woods v. Indiana Univ.-Purdue Univ. at Indianapolis*, 996 F.2d 880, 884 (7th Cir. 1993). Rule 15(c) provides, in pertinent part, that "[a]n amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed.R.Civ.P. 15(c)(l) & (2).

To prevail on a relation back argument under Rule 15(c), a litigant must show that: (1) the amended complaint arises out of the same occurrence set forth in the original complaint; (2) the added defendant received notice of the institution of the action within the applicable statute of limitations so that it will not be prejudiced in maintaining its defense on the merits; and (3) the added defendant knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. *Wood v. Worachek*, 618 F.2d 1225, 1229 (7th Cir. 1980).

Here, as explained below, Central States has failed to show that the First Amended Complaint relates back to the Original Complaint.

1. Same Occurrence/Transaction

For an amendment to relate back under Rule 15(c), it is necessary that the "claim or defense asserted in the amended

pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In the present case, the withdrawal liability led to the filing of the Original Complaint. The First Amended Complaint, adding the Moving Defendants, was based upon this same occurrence. The First Amended Complaint merely added new parties, and retained the original claims. Accordingly, this Court finds that the First Amended Complaint arose out of the same occurrences set forth in the Original Complaint.

2. Notice/Prejudice

Under Rule 15(c), the party added by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Fed. R. Civ. P. 15(c). In applying this aspect of the rule, "'notice' as that term is employed in the rule, serves as the means for evaluating prejudice." *Woods*, 996 F.2d at 888 ("the statute of limitations does not insulate from suit an individual who did not initially receive service (or other notice) . . . so long as no prejudice resulted"). Therefore, the amount of prejudice that an added defendant will suffer is judged by the amount of notice that he has received.

Interpreting the meaning of "prejudice," the Seventh Circuit noted that there will be no prejudice if either "the added defendant has had sufficient notice of the institution of the action . . . . or if a sufficient identity of interest exists between the new defendant and the original one so that relation back would not be prejudicial." *Norton v. Int'l Harvester Co.*, 627 F.2d 18, 20-21 (7thCir. 1980).

Here, Central States contends that the Moving Defendants had an identity of interest with the entities in the Original Complaint because they are considered a "single employer"

within the meaning of ERISA. Therefore, Central States contends that the Moving Defendants were not prejudiced.

Central States' argument, however, goes against the holding in *Central States Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1057-58 (N.D. Ill. 1994) (emphasis added), where the court held that:

> In a withdrawal liability case the commencement of the statute of limitations period *does not depend upon the pension fund's knowledge of the identity of all members of a control group* who may be jointly and severally liable.
>
> * * * *
>
> To hold that a cause of action does not accrue until a Fund learns of the identity of controlled group members would run counter to the purposes of such limitations which is to prevent stale claims which are difficult to prove and allow potential defendants to assess their liabilities.

Similarly, in *Navaco*, 3 F.3d at 172-73, the Seventh Circuit noted that:

> Six years from the time of the injury, which § 1451(f)(1) affords as the minimum in every case, is generous. Congress appreciated that it might be difficult to ascertain the existence of a claim and track down persons liable under the Employee Retirement Income Security Act, a complex statute. . . . Pension funds and other persons holding claims under ERISA can use that six years to investigate . . . . The pension funds in our case, however, see the six years as a period of rest and recuperation. Only after knowing that they have not been paid, and recognizing who is liable, does the six years even start, the funds say. Yet if the time does not begin until the fund knows everything it needs to know—the existence of the debt, nonpayment, and the identity (and relation to the employer) of control group

> members—why is the period so long? Statutes of limitations provide time within which a person who knows of an injury may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable. After completing the investigation, a pension fund should be able to make a demand (and, if necessary, file suit) in a matter of weeks. Allowing six years is understandable only on the assumption that the time was to be used to search for vital information.

The *Navaco* court added that "[a]ny other approach would make the statute of limitations illusory," and rejected the pension funds' argument—that the time would not even commence until all ancillary questions about the scope of control and the nature of the business have been resolved because "[d]oing the research on these questions is what the six years are for." *Id.* Accordingly, the court noted that:

> Turning six years into twenty-six is a job best left to magicians. Statutes of limitations serve vital social interests—the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MIPPAA the unusual one of protecting the beneficiaries of the fund. Congress told the trustees of pension funds not to tarry in assessing and collecting liability.

Consequently, this court rejects Central States "control group argument," and because Central States has not presented any evidence that the Moving Defendants received sufficient notice under Rule 15(C), this court finds Central States has not met Rule 15(c)'s prejudice requirement.

3. Mistake of Misnaming the Proper Defendants

Lastly, Central States contends that the First Amended Complaint relates back because it mistakenly misnamed the proper parties in the Original Complaint.

Central States is correct in that "Rule 15(c) was designed to protect a plaintiff who names a party mistakenly and then discovers the proper party's identity after the statute of limitations has run." *Hill*, 924 F.2d at 1374. However, Rule 15(c) only applies to situations where a party mistakenly identifies a proper party, not in cases where the plaintiff completely omits the proper party altogether because the plaintiff does not know of their existence. *Wood*, 618 F.2d at 1230; *Hampton v. Hanrahan*, 522 F. Supp. 140, 143 (N.D. Ill. 1981). As the court in *Navaco* clearly spelled out, the plaintiff has a duty to diligently investigate to determine "who is liable," and six years is more than enough time to complete such an investigation. 3 F.3d at 171.

Here, the court finds that Central States was not diligent in its investigation of the Defendants. For example, Central States admit that in "[p]reparing to serve the[] original complaint," it discovered that it did not have all of the names of the proper Defendants. (Pl.'s Resp. at 9.) Central States further concede that they finally located the names of the Moving Defendants through an article in the *Indianapolis Business Journal* that was published in April of 1990. Thus, the information identifying the Moving Defendants was clearly available to Central States during the six-year period in which the statute of limitations was running.

In conclusion, although the Plaintiffs' First Amended Complaint arose out of the same occurrence set forth in the Original Complaint, the other requirements of Rule 15(c) have not been met. Therefore, this court cannot allow the First Amended Complaint to relate back to the date of the filing of the Original Complaint, and the First Amended Complaint, as it relates to the Moving Defendants, is barred by the statute of limitations.

II. Service of Process Under Rule 4(m)

Both Central States and the Initial Defendants have filed motions disputing the sufficiency of Central States' service of summons pursuant to Rule 4(m). Central States moved to alter or amend this court's December 13, 1997 order denying Central States' motion to extend time to serve Defendants Ethan and Franklin Jackson (collectively, "the Jacksons") and dismissing the complaint without prejudice, pursuant to Rule 4(m). Similarly, the Initial Defendants moved to vacate this court's November 26, 1996 Order extending Central States time to serve summons on the Initial Defendants, pursuant to Rule 4(m).

Rule 4(m) directs the court to dismiss an action without prejudice when service of the complaint is not made upon the defendant within 120 days after the filing of the complaint. When considering motions to dismiss for insufficiency of service under Rule 4(m), the court "must first inquire whether plaintiff has established good cause for failing to effect timely service." *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996). If good cause is shown the court should extend the time of service. *Id.* However, if good cause is not shown, the court has discretion to consider whether a "permissive extension of time is warranted" or dismiss the action without prejudice. *Id.* at 340-41.

The plaintiff has the burden to prove good cause under Rule 4(m). *Bachenski v. Malnati*, 11 F.3d 1371, 1376 (7th Cir. 1993). Although the Seventh Circuit has not set forth a "precise test for good cause," the plaintiff's "attempts at service need be at the very least . . . . accompanied by some showing of reasonable diligence before good cause [may] be found." *Id.* at 1376-77.[3] *See also Young v. City of Chicago*,

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[3] Evasion of service of process is the "only example of good cause provided by the legislative history" of Rule 4(m). *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988), *citing* 1982 U.S. Code Cong. Admin. News 4434, 4446 n.25.

1995 WL 562093, at *4 (ND, Ill. Sept. 21, 1995) (Rule 4(m) "is intended to force parties and their attorneys to be diligent in prosecuting their causes of action"). "Inadvertent failure to serve" or "half-hearted efforts to serve the defendant" do not constitute good faith. *Geiger*, 850 F.2d at 333. *Accord Serlin v. Arthur Anderson & Co.*, 145 F.R.D. 494, 494 (N.D. III. 1993) ("Counsel's lack of diligence, inadvertence or negligence and half-hearted efforts to serve a defendant do not support a finding of good cause"). Moreover, "a statute of limitations problem will not serve to establish good cause" and prevent dismissal under Rule 4(m). *Floyd v. United States*, 900 F.2d 1045, 1048 (7th Cit. 1990).

Here, the court finds that the Plaintiffs have not demonstrated "good faith" in their failure to serve the Initial Defendants and the Jacksons within the 120 days prescribed by Rule 4(m). The facts presented to this court show that Plaintiffs were not diligent in their attempt to timely serve the Initial Defendants and the Jacksons.

For example, with respect to the Initial Defendants, after filing their Original Complaint, Central States never even attempted to serve the Initial Defendants during the 120 days required by Rule 4(m). Not until six days before the 120-day period ended did Central States seek an extension of time. In seeking an extension of time, Central States contended that it could not serve the Initial Defendants within 120 days because: (1) it wanted to serve all the defendants simultaneously to prevent the defendants from sheltering assets; and (2) the "maze of intercorporate relations" and Central States' "national litigation interests" hindered its efforts to serve the Initial Defendants.

The court finds both of these reasons to be without merit. In *Navaco*, the Seventh Circuit clearly spelled out that the plaintiff has a duty to diligently investigate to determine "who is liable," and six years is more than enough time to complete such an investigation. 3 F.3d at 171. Here, Central

States waited six years before filing its Original Complaint. Clearly, this was more than enough time to allow Central States to remedy the concerns that they raised above.

Likewise, with respect to the Jacksons, this court notes that the Jacksons are each listed in the Indianapolis telephone directory, and therefore, their addresses were easily ascertainable. Consequently, this court cannot find that Central States has demonstrated "good cause" to warrant an extension of time pursuant to Rule 4(m). *See Geiger*, 850 F.2d at 333 (affirming trial court's finding that plaintiff failed to establish good cause under Rule 4(m), where the defendant's telephone number was located in the Chicago phone book).

Finally, although this court has discretion to grant Central States a "permissive extension of time," *Panaras*, 94 F.3d at 340-41, this court finds that Central States has not presented any reasons for this court to grant such an extension.[4] Consequently, this court grants the Initial Defendants' motion and denies Central States' motion, and dismisses this action without prejudice, pursuant to Rule 4(m), with respect to the Initial Plaintiffs and the Jacksons.[5]

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[4] The court notes that in *Torrespico v. Columbia College*, 1998 WL 703450, at * 10 (ND. Ill. Sept. 30, 1998), the court, in exercising its discretion to grant a "permissive extension," considered whether the statute of limitations "would bar the refiled action." Here, because of the lengthy six-year statute of limitation and Central States' lack of diligence, this court will not grant a "permissive extension," regardless of whether the statute of limitations bars Central States from refiling this action.

[5] Furthermore, Central States is advised that although an action dismissed without prejudice under Rule 4(m) may be refiled, such a refiling will be allowed only if it satisfies the applicable statute of limitations. *See. e.g., Bachenski*, 11 F.3d at 1373, 1378; *Lewellen v. Morley*, 875 F.2d 118, 119-20 (7th Cir. 1989). Filing of the original claim without effective service of process does not toll the statute of limitations. See *Lewellen*, 875 F.2d at 119-20.

CONCLUSION

For the foregoing reasons, this court: (1) denies Plaintiffs Central States, Southeast and Southwest Areas Pension Fund's and Howard McDougal's motion to alter or amend this court's December 13, 1997 ruling [17-1] and dismisses the complaint without prejudice, pursuant to Rule 4(m), as to Defendants Ethan and Franklin Jackson; (2) grants Defendants' motion to dismiss the first amended complaint [20-1] and dismisses the complaint with prejudice, pursuant to Rule 12(b)(6), as to Defendants: EFB Development Co.; Sanibel Development Co.; Sanibel Investment Co.; Turtle Creek of Tennessee; Hato Rey Professional Arts, Inc.; Turtle Creek North Apartments; Village Green Apartments; Turtle Creek Apartments of Kokomo; Turtle Creek Apartments of Frankfort; Turtle Creek Apartments of Connersville; Turtle Creek Apartments of Marion; Roxbury Square, Ltd.; Turtle Creek of Indiana; Wheel Estates; EFB Coal Co.; Horn AG Services Inc.; Table-Fresh Grapes, Inc.; Arizona Desert Growers; Desert Vineyards, Inc.; Red Mountain Products; the Racquets IV Tennis Club, Inc.; and Ronald Hicks; and (3) grants Defendants' motion to vacate this court's November 26, 1996 Order and to dismiss the Plaintiffs' first amended complaint [23-1] and dismisses the complaint without prejudice, pursuant to Rule 4(m), as to Defendants: Basic American Industries, Inc.; Jackson's Reality & Builders Co.; C&B Wood Suppliers. Inc.; E&F Realty Co.; Waterfront Development Co.; EFB Development Co.; Turtle Creek Investment Co.; Liquid Oil Growers Organization, Inc.; Southwest Agri- Development Specialists, Inc.; and Brady R. Justice. It is so ordered.

ENTER:

BLANCHE M. MANNING
U.S. DISTRICT COURT JUDGE

DATE: October 18, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 00-3920

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INCORPORATED, WATERFRONT DEVELOPMENT COMPANY, INCORPORATED, EFB DEVELOPMENT COMPANY, INCORPORATED, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 96 C 4736, Blanche M. Manning, Judge

July 3, 2001

ORDER

Before Hon., William J. Bauer *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. John L. Coffey, *Circuit Judge*

On June 19, 2001 plaintiffs-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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96 C 4736
Hon. Blanche M. Manning

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, and
HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

BASIC AMERICAN INDUSTRIES, *et al.*
Defendants.

Date: September 30, 1997

MINUTE ORDER

Plaintiff's motion (#17-1) to alter or amend ruling of December 13, 1997 is denied. Defendants' motion to dismiss the first amended complaint (#20-1) is granted. A detailed order will be filed on or before October 31, 1997 setting forth the reasons therefor. Defendants' motion to vacate (#22-1) this court's order of 11/26/96 and to dismiss (#23-2) this action without prejudice is granted. A detailed order will be filed on or before October 31, 1997, setting forth the reasons therefor.

Plaintiff's motion to alter or amend ruling is denied. The court has found that plaintiff failed to show good cause warranting an extension of time within which to effectuate service of summons. While the court has found an absence of

good cause, it has also considered whether a permissive extension was appropriate. In so doing, it has taken into account, in addition to other factors the substantial period of time which plaintiff has within which to effectuate service (6 years). The court was also mindful of the fact that the statute of limitations had run. In considering and weighing all of the facts brought to its attention, the court in the exercise of its discretion ruled against plaintiff. That ruling stands.

Supreme Court, U.S.
FILED
NOV 30 2001
OFFICE OF THE CLERK

(2)

No. 01-563

In the
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, A PENSION TRUST, AND HOWARD MCDOUGALL, TRUSTEE,

PETITIONERS,

V.

BASIC AMERICAN INDUSTRIES, INC., ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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27pp

QUESTION PRESENTED

Whether the Seventh Circuit correctly held, consistent with this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 552 U.S. 192 (1997), that under the facts of this case a cause of action arose respecting the entire withdrawal liability owed by a bankrupt employer to an employee benefit plan, thereby commencing the six-year statute of limitations for suit under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1301 et seq., when the bankrupt employer ceased operations (thus disabling itself from fulfilling its withdrawal liability obligation) and the plan demanded payment in full.

CORPORATE DISCLOSURE

None of the Respondents has a parent corporation, and no public company owns stock in any corporation which is a Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 5

I. THE COURT OF APPEALS' DECISION IS CORRECT AND DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BAY AREA* OR WITH THE DECISION OF ANY OTHER COURT OF APPEALS 6

II. THE JUDGMENT IN THIS CASE COULD ALSO BE AFFIRMED, IN THE ALTERNATIVE, BASED ON PRIOR TRANSACTIONS THAT WOULD HAVE TRIGGERED THE STATUTE OF LIMITATIONS EVEN EARLIER 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Page(s)

American Hospital Supply Corp. v. Hospital Products Ltd.,
780 F.2d 589 (7th Cir. 1986) 8

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.,
552 U.S. 192 (1997) ..... *passim*

Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.,
43 F.3d 852 (3rd Cir. 1994) 7

C.L. Maddox, Inc. v. Coalfield Services, Inc.,
51 F.3d 76 (7th Cir. 1995) 8

Central States, Southeast & Southwest Areas Pension Fund v. Mississippi Warehouse Corp.,
853 F. Supp. 1053 (N.D. Ill. 1994) 11

Central States, Southeast & Southwest Areas Pension Fund v. Slotky,
956 F.2d 1369 (7th Cir. 1992) 11

Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc.,
125 F.3d 526 (7th Cir. 1997) 12

First National Bank v. Continental Illinois National Bank & Trust Co.,
933 F.2d 466 (7th Cir. 1991) 8

Franconia Associates v. United States,
240 F.3d 1358 (Fed. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3193 (U.S. Sept. 10, 2001) (No. 01-455) 14

Graver Tank & Manufacturing Co. v. Linde Air Products Co.,
336 U.S. 271 (1949) 13

I.L.G.W.U. National Retirement Fund v. Meredith Grey, Inc.,
190 F.R.D. 324 (S.D.N.Y. 1999) 16

Lambert v. Wicklund,
520 U.S. 292 (1997) 6

NYNEX Corp. v. Discon, Inc.,
525 U.S. 128 (1998) 12

Penn-Ohio Steel Corp. v. United States,
354 F.2d 254 (Ct. Cl. 1965) 14

White v. Prenzler,
131 N.E.2d 540 (Ill. 1956) 14

Wisniewski v. United States,
353 U.S. 901 (1957) 12

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 1301 et seq. i
29 U.S.C. § 1301(b)(1) 3, 11
29 U.S.C. § 1381(b) 3
29 U.S.C. § 1382 9
29 U.S.C. § 1383(a)(2) 2, 9, 10
29 U.S.C. § 1391 9
29 U.S.C. § 1399(b)(1) 9
29 U.S.C. § 1399(c)(2) 2, 12
29 U.S.C. § 1399(c)(5) 13, 14
29 U.S.C. § 1451(a)(1) 3
29 U.S.C. § 1451(f) 11

OTHER AUTHORITY

51 Am. Jur. 2d *Limitations of Actions* § 133 7

E. Allen Farnsworth, *Contracts* § 8.20 (3d ed. 1999) 8

Restatement (Second) of Contracts § 250(b) (1981) 10

In the
Supreme Court of the United States

No. 01-563

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
A PENSION TRUST, AND HOWARD MCDOUGALL,
TRUSTEE,

PETITIONERS,

V.

BASIC AMERICAN INDUSTRIES, INC., ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2001. A petition for rehearing was denied on July 3, 2001. The petition for a writ of certiorari was filed on

October 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the statory provisions included the petition this case involves 29 U.S.C. § 1383(a)(2) and 29 U.S.C. § 1399(c)(2), included in the appendix hereto.

STATEMENT OF THE CASE

Prior to 1989, three affiliated employers, collectively known as "Allied Grocers," entered into collective bargaining agreements that required them to make pension contributions to petitioner Central States, Southeast and Southwest Areas Pension Fund, a Pension Trust ("Central States"), on behalf of certain employees. On June 22, 1989, Allied Grocers filed for relief under Chapter 11 of the U.S. Bankruptcy Code (the "Bankruptcy"). Under Central States' "Rules and Regulations Pertaining to Employer Withdrawal Liability" ("Withdrawal Liability Rules"), this entitled Central States to declare a default of Allied Grocers' withdrawal liability obligation. The Withdrawal Liability Rules also specifically provide that "[i]n the event of a default, the outstanding amount of the withdrawal liability shall immediately become due and payable."[1] On May 18, 1990, Central States filed proofs of claim for the entire withdrawal liability in Allied Grocers' Bankruptcy proceeding, an amount totaling $751,918.80. Pet. 4-5.

On or about June 2, 1990, Allied Grocers ceased operations. As a result, Allied Grocers and all trades or businesses under common control with them (the "Allied Controlled Group") effected as a matter of law a complete withdrawal from Central States under Section 4201(b) of the

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[1] Defendants-Appellees' Supplemental Appendix, filed in the court of appeals ("7th Cir. Supp. App.") at 23.

Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), 29 U.S.C. § 1381(b). Consequently, all members of the Allied Controlled Group became potentially liable for Allied Grocers' withdrawal liability to Central States. Although it had already filed proofs of claim in the Bankruptcy, Central States sent a notice and demand for payment of withdrawal liability to Allied Grocers on or about June 18, 1990 (the "Notice and Demand"). The amount of the Notice and Demand, $751,918.80, was precisely the same amount that Central States had demanded in its proofs of claim in Allied Grocers' Bankruptcy on May 18, 1990. Allied Grocers never initiated arbitration on the correctness of Central States' assessment of withdrawal liability. Pet. App. 2a-3a, 16a-17a.

On July 31, 1996, more than six years after the latest of the foregoing events, petitioners filed a Complaint in the United States District Court for the Northern District of Illinois seeking to collect MPPAA withdrawal liability under 29 U.S.C. § 1451(a)(1) from certain members of the Allied Controlled Group (the "Original Defendants").[2] The Complaint asserted that the Original Defendants were jointly and severally liable for withdrawal liability under 29 U.S.C. § 1301(b)(1), and sought to collect $751,918.80, the same amount sought by Central States in its proofs of claim in the Bankruptcy and in the Notice and Demand to Allied Grocers. Later, petitioners filed a First Amended Complaint adding additional members of the Allied Controlled Group as co-defendants. All of the defendants (hereafter, respondents) filed motions to dismiss the Complaint and the First Amended Complaint on the ground that petitioners' withdrawal liability claim was barred by the applicable MPPAA six-year statute of limitations. Pet. App. 3a, 17a.

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[2] Central States had by that time already settled with Allied Grocers. Pet. App. 3a.

On September 30, 1997, the district court made several rulings which, in essence, granted respondents' motions to dismiss. Pet. App. 17a, 30a-31a. The court indicated that it would issue a more detailed order setting forth the grounds for these rulings on or before October 31, 1997, but it failed to do so and petitioners pursued an appeal. Pet. App. 13a-14a. On February 27, 1998, however, the Seventh Circuit dismissed that appeal due to the lack of an explanation by the district court and the absence of an entry of a final judgment under Rule 58 of the Federal Rules of Civil Procedure. Pet. App. 13a-14a.

On remand, after considering supplemental briefs addressing *inter alia* the impact of this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997), the district court reaffirmed its original rulings and dismissed the action in its entirety as time-barred by the MPPAA's six-year statute of limitations. Pet. App. 15a-28a.

The court of appeals affirmed. Pet. App. 1a-12a. Writing for a unanimous panel, Judge Posner explained that the "thrust" of this Court's opinion in *Bay Area* "was to assimilate statute of limitations issues under the [MPPAA] to the legal principles generally applicable to statutes of limitations issues," Pet. App. 4a, and on that understanding held that petitioners' statute of limitations

> beg[an] to run—still more than six years before Central States sued—no later than June 18, 1990, when, Allied [Grocers] having ceased operations on June 2, Central States served on Allied [Grocers] a formal demand for payment of the withdrawal liability set forth in the proof of claim that it had filed in the bankruptcy proceeding. Complete cessation of operations precipitates . . . the employer's (and any affiliates') withdrawal liability. That was the default,

> and the demand determined its amount (before that determination, a suit would have been premature).

Pet. App. 9a. The court of appeals acknowledged that, as required by law, Central States had demanded payment under an installment plan, but the court concluded that under *Bay Area* this "statutory requirement does not prevent the fund from accelerating all future payments upon default, thus making all the installments due at once." Pet. App. 10a-11a (citation omitted).

On June 19, 2001, Central States filed a petition for rehearing and a petition for rehearing *en banc*. All of the judges on the original panel voted to deny the petition, and none of the active judges requested a vote on the petition for rehearing *en banc*. Pet. App. 29a.

ARGUMENT

The Seventh Circuit held that a cause of action arose by reason of acceleration of the entire amount due, thereby commencing the six-year statute of limitations for withdrawal liability suits, when Allied Grocers (already in Chapter 11 proceedings) defaulted on its withdrawal liability obligation by ceasing operations and Central States thereafter demanded payment in full of the entire amount of the withdrawal liability obligation. The decision in this case is the first (and, so far, only) court of appeals decision applying this Court's teachings in *Bay Area* in circumstances where the withdrawing employer is bankrupt and disabled from paying its withdrawal liability.

In applying common law anticipatory repudiation rules in this context to determine when petitioners' cause of action arose for statute of limitations purposes, the court of appeals was expressly guided by this Court's reliance on common law principles in *Bay Area*. And the court of appeals' conclusion—that petitioners' suit is time-barred—followed logically and reasonably from those principles.

Although petitioners disagree with the court of appeals' decision in several respects, the decision is consistent with *Bay Area*, and it does not conflict with the decision of any other court of appeals. Central States' statement (Pet. 10) that the "Seventh Circuit's decision in this case creates uncertainty as to when a cause of action accrues under MPPAA" fails to establish a confict—direct, apparent or otherwise—that requires resolution by this Court. *See Lambert v. Wicklund*, 520 U.S. 292 (1997). Nor have petitioners demonstrated that the questions presented, though important to the parties, are of significant national importance. There is, accordingly, no warrant for this Court to grant review. If a circuit conflict ultimately arises on these issues—which have in the four years since *Bay Area* featured solely in this one appellate case—this Court can resolve it then with the benefit of that further percolation in the lower courts.

I. THE COURT OF APPEALS' DECISION IS CORRECT AND DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BAY AREA* OR WITH THE DECISION OF ANY OTHER COURT OF APPEALS

In *Bay Area*, this Court addressed when the MPPAA's six-year statute of limitations began to run on a pension fund's action to collect unpaid withdrawal liability by applying basic, common law limitations rules. As the court of appeals observed, the "thrust of the [*Bay Area*] opinion . . . was to assimilate statute of limitations issues under the [MPPAA] to the legal principles generally applicable to statutes of limitations." Pet. App. 4a (citing *Bay Area*, 522 U.S. at 195, 208, 210). In particular, this Court held that the MPPAA "incorporates the standard rule that the limitations period commences when the plaintiff 'has a complete and present cause of action,'" and that "a cause of

action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area*, 522 U.S. at 201 (citation omitted).

This Court then applied that principle to the facts of the case before it, using the common law rule applicable to missed installment payments. *Id.* at 208. Applying that rule, it concluded that the plan's cause of action did not accrue until the employer failed to make its first payment, because until that time the employer had not defaulted and the plan had no cause of action. *Id.* at 208-09. Moreover, because the plan had not opted to accelerate the debt upon the first or any successive missed payment, this Court held that, under the standard installment-payment rule, the limitations period started to run on each payment only when the employer defaulted on that payment. *Id.*

The Court recognized, however, that the installment-payment rule is not always controlling. This Court stated:

> Where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each installment, at the time the installment becomes due, *unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option.*

Id. at 209 n.5 (quoting *Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 857 (3d Cir. 1994) (quoting 51 Am. Jur. 2d *Limitations of Actions* § 133 (1970))) (internal quotations omitted) (emphasis added). This Court did not purport, however, to discuss or define all circumstances or events that might result in "acceleration." The task of clarifying the application of acceleration principles to varying factual situations, including those involving an employer's

bankruptcy, was appropriately left for development in the lower federal courts.

In this case, the Seventh Circuit correctly recognized that this Court's application of the installment-payment rule—*i.e.*, that "'each missed payment [of an MPPAA installment obligation] creates a separate cause of action with its own six-year limitations period'"—was rendered in and is limited by the "context" of its decision in *Bay Area*, "which did not include bankruptcy," Pet. App. 4a (quoting *Bay Area*, 522 U.S. at 195), and it correctly applied acceleration principles, rather than the installment-payment rule, to the very different facts of this case.

The court of appeals observed that, in addition to failing to make a payment that has become due, a payor can likewise default "by repudiating the obligation to pay." Pet. App. 4a. "[A]nticpatory repudiation," the court explained, "is a breach of contract that entitles the payee to sue without waiting for the date when payment was due to come and go." Pet. App. 4a-5a. It is well established that "anticipatory repudiation (sometimes called anticipatory breach) is conceived of primarily as a trigger of a contract party's right of self-help, like the breach of a condition in a contract." Pet. App. 5a (citing *C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76, 81 (7th Cir. 1995); *First Nat'l Bank v. Continental Ill. Nat'l Bank & Trust Co.*, 933 F.2d 466, 469 (7th Cir. 1991); *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 599 (7th Cir. 1986); E. Allan Farnsworth, *Contracts* § 8.20 (3d ed. 1999)). An anticipatory breach "occurs when it is reasonably certain that the other party is not going to meet its obligations under the contract in timely fashion. At that point the potential victim is freed from its own contractual obligations and authorized to take all reasonable self-protective measures, including suing." Pet. App. 12a.[3]

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[3] Petitioners claim that the doctrine of anticipatory repudiation is inappropriate here because "there was no additional performance required

Applying that principle, the court of appeals found it reasonably certain that Allied Grocers would not be able to pay its withdrawal liability as of June 2, 1990, when Allied Grocers, having previously filed for protection under Chapter 11, ceased operations. Pet. App. 9a. Allied Grocers' termination of operations effected its complete withdrawal from the plan and triggered its withdrawal liability. 29 U.S.C. § 1383(a)(2). And, in light of Allied Grocers' Bankruptcy, the court of appeals correctly recognized that "[w]hen Allied [Grocers] ceased operating, Central States knew it would never see any of the scheduled installment

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by the pension plan" and because the obligation to pay withdrawal liability is akin to a contract requiring "the payment of money only." Pet. 24-25. Contrary to petitioners' argument, the MPPAA and the terms of the pension plan imposed a host of continuing obligations on Central States after Allied Grocers' complete withdrawal from the fund. To begin with, Central States retained the core obligation to pay the pensions of Allied Grocers' former employees. Pet. App. 6a. Moreover, Central States was required to calculate the amount of withdrawal liability owed by Allied Grocers in accordance with the MPPAA and the terms of the pension plan, *see* 29 U.S.C. §§ 1382, 1391, and further required to send proper written notice and demand for payment of the amount of withdrawal liability, *see* 29 U.S.C. §§ 1382, 1399(b)(1). In sum, "MPPAA's complex scheme for calculating withdrawal liability" is simply not, as Central States alleges, analogous to a contract solely for the payment of money. *See Bay Area*, 522 U.S. at 196. Petitioners seek to discount the significance of Central States' continuing nonmonetary obligations by protesting that Central States' obligation to pay pensions to affected employees is imposed by statute, not contract, and that the plan is obliged by statute to pay these pensions regardless of whether the employer pays its corresponding withdrawal liability. Pet. 23. This argument misses the most fundamental point in *Bay Area*—that the basic common law principles that determine what triggers statutes of limitations for breaches of contract (in that case, breaches of installment contracts) supply the rules of decision for determining what triggers the statute of limitations for breaches of MPPAA withdrawal liability obligations, even though the latter are not purely contractual. *See Bay Area*, 522 U.S. at 208-10.

payments." Pet. App. 11a.[4] As the court explained, because Central States had an unsecured claim,

> Allied [Grocers] could not make any of the installment payments without violating the absolute priority rule of 11 U.S.C. § 1129(b). With fewer assets than claims, Allied [Grocers] would certainly pay the fund less than the full value of its claim. The best the fund could hope for was a partial settlement of the withdrawal liability. *It should therefore have concluded on June 2, 1990, that Allied [Grocers] had repudiated its withdrawal liability. Put differently, on that day it became clear that Allied [Grocers] had disabled itself from paying the withdrawal liability.*

Pet. App. 11a (emphasis added). Allied Grocers' termination of operations thus constituted a default on its entire withdrawal liability obligation, since (as the court of appeals observed) "[t]he standard rule in contract law is that the promisee is free to sue for anticipatory repudiation as soon as the promisor has disabled itself from performing its contractual obligations." Pet. App. 11a (citing *Restatement (Second) of Contracts* § 250(b) (1981)).[5]

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[4] Petitioners contend that the court of appeals erred in this conclusion, because an employer that ceases *covered* operations (the statutory event that causes a complete withdrawal from a plan under 29 U.S.C. § 1383(a)(2)) does not necessarily cease *all* operations, and may in fact be able to produce enough revenue from *noncovered* operations to pay withdrawal liability. Pet. 19. That argument is unavailing here because the court of appeals' finding that Allied Grocers ceased its operations was not limited to Allied Grocers' "covered operations." *See* Pet. App. 2a, 9a, 11a.

[5] Petitioners do not dispute the court's conclusion that Central States should have recognized by June 2, 1990, Allied Grocers' inability to pay its withdrawal liability. They argue, however, that Allied Grocers' anticipatory repudiation should not carry over to affect the Allied Controlled Group. Pet. 26. Contrary to petitioners' argument, the court of appeals correctly recognized that Allied Grocers' default was contemporaneous with the default of the Allied Controlled Group,

Having determined that Allied Grocers defaulted on its withdrawal payment obligation on June 2, 1990, the court of appeals reasonably concluded that Central States took the last step necessary to establish a "complete and present cause of action" within the meaning of *Bay Area*, thus triggering the six-year statute of limitations, when it "determin[ed] the amount [of withdrawal liability] due, which happened, at the very latest, on June 18, more than six years before the suit was brought." Pet. App. 11a. On that date, Allied Grocers' default, *i.e.*, the anticipatory repudiation, and Central States' formal Notice and Demand for full payment of the withdrawal liability sent two weeks later, *i.e.*, the acceleration, converged to produce a full and complete cause of action, thereby triggering the MPPAA six-

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observing that "[c]omplete cessation of operations precipitates, as we have seen, the employer's (*and any affiliates'*) withdrawal liability." Pet. App. 9a (emphasis added). Although petitioners contend that there could be no anticipatory repudiation by Allied Grocers unless the entire Allied Controlled Group were also hopelessly insolvent, petitioners cite no legal authority to support that contention. To the contrary, the plain language of the statute does not differentiate amongst employers, controlled group members, or any other potential defendants, solvent or insolvent, in this regard. *See* 29 U.S.C. § 1301(b)(1) (stating that where employer is under "common control" with other trades or businesses, all entities are treated as single employer). The limitations statute simply rings the bell for all to hear. *See Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992) (reiterating that notice to one controlled group member is notice to all); *Central States, Southeast & Southwest Areas Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1059 (N.D. Ill. 1994) (holding that action brought against alleged controlled group member jointly and severally liable for withdrawal liability must be commenced within six-year limitations period under 29 U.S.C. § 1451(f)). Moreover, even if petitioners' position were better supported, there is no disagreement among the circuits on this issue, and petitioners' disagreement with the Seventh Circuit over this aspect of the common law doctrine of anticipatory repudiation does not warrant this Court's review.

year statute of limitations for the entire amount of withdrawal liability.[6]

Petitioners contend that these events were not sufficient to trigger the statute of limitations because this Court recognized in *Bay Area* that the statutory right to accelerate the entire withdrawal liability upon a default is permissive and, according to petitioners, Central States made no election to accelerate here. *See* Pet. 16-18, 21-25. This argument has no merit in fact or law. To begin with, contrary to petitioners' assertion, the court of appeals quite reasonably concluded, in light of Allied Grocers' Chapter 11 status, that Central States' demand of full payment upon Allied Grocers' cessation of operations *did* constitute an election to accelerate the entire withdrawal liability. Indeed, that is the only reasonable interpretation of Central States' action, since Central States' Withdrawal Liability Rules provide that in the event of a default the full amount of the withdrawal liability "*shall* immediately become due and payable." 7th Cir. Supp. App. at 23 (emphasis added).

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[6] Though Allied Grocers never sought arbitration, petitioners argue that the statute of limitations could not begin to run until the close of the period in which Allied Grocers *could have* requested arbitration. Pet. 20-21. This argument is not reflected or fairly included within either of petitioners' questions presented, and it is therefore not preserved for this Court's review. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998). Moreover, the argument is meritless and not remotely certworthy. In light of the statutory requirement to pay withdrawal liability on schedule irrespective of any request for arbitration, 29 U.S.C. § 1399(c)(2), the court of appeals correctly noted that, once the statute of limitations commenced by reason of Allied Grocers' anticipatory repudiation, it ran independently from any theoretical arbitration option. *See* Pet. App. 9a ("[T]he right to arbitration presupposes that the cause of action has already arisen."). The only case petitioners cite to the contrary is the Seventh Circuit's decision in *Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526 (7th Cir. 1997). That case is inapposite—as it *did not* involve a bankrupt and nonoperating employer, and the employer *did* request arbitration—but even if it were closer to the mark, an intra-circuit conflict would not warrant this Court's intercession. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioners' disagreement with that factual finding is meritless and, in any event, is hardly a matter warranting this Court's review. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Moreover, petitioners fail to support their contention that a voluntary election to accelerate is required as a matter of law where, as here, the employer has taken action disabling itself from compliance with its full withdrawal payment obligations. Although the statute provides that a plan *may* accelerate in the event of a default, *see* 29 U.S.C. § 1399(c)(5), that provision is not dispositive of the separate question of when the statute of limitations begins to run. If it were, this Court could have decided *Bay Area* based on the statute alone. Instead, the Court made it clear that the MPPAA incorporates common law rules for determining what events trigger its statute of limitations, 522 U.S. at 201, and it applied the appropriate common law rule to decide the case before it. Under the facts in *Bay Area*, which did not involve bankruptcy, the Court concluded that the general installment-payment rule applied. Under that rule, the Court found that, absent a voluntary decision by the creditor to accelerate, "'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Id.* at 208 (citation omitted). Under the very different facts of this case, the court of appeals applied a different common law rule, the doctrine of anticipatory repudiation. The court rightly found that "nothing in [*Bay Area*] or its logic . . . suggest[s] that the principles of anticipatory repudiation have no role to play under the MPPAA." Pet. App. 6a.

Petitioners argue (Pet. 24-25) that the court of appeals misapplied this common law doctrine, and that the common law of anticipatory repudiation in fact vests the creditor with complete discretion whether to accelerate the debt. But the sources petitioners cite—mostly obsolete cases and

treatises—do not come close to establishing a current majority rule to that effect and do not even address circumstances where, as here, the debtor plainly and simply has no ability to perform. The only current case petitioners cite is *Franconia Assocs. v. United States*, 240 F.3d 1358 (Fed. Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3193 (U.S. Sept. 10, 2001) (No. 01-455). This case, however, cuts against (not for) their position. The Federal Circuit held that, in circumstances "when an obligor communicates to an obligee that he will commit a breach in the future," the statute of limitations "begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation." *Id.* at 1363. But the Federal Circuit distinguished that circumstance from the case before it, where Congress had statutorily forbidden the government from complying with the contract, in which case the court found that the cause of action accrued, and the statute of limitations began to run, on the date of Congress's enactment. This case is more like the latter circumstance, because here (as in *Franconia*) the obligor did not merely renounce an intent to perform but disabled itself from performing. The only other authorities petitioners cite to support their supposed "general rule" of voluntary acceleration are 36-year-old dictum from a footnote in *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 272 n.35 (Ct. Cl. 1965), and a 45-year-old state court decision, *White v. Prenzler*, 131 N.E.2d 540, 543 (Ill. 1956), which turned on the plaintiff's lack of knowledge of the purported anticipatory repudiation. These antiquated citations demonstrate no split of authority, much less a current conflict warranting a grant of certiorari.[7]

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[7] Petitioners argue that the MPPAA already includes the concept of anticipatory repudiation as an event of statutory default and does not except this class of defaults from its rule of permissive acceleration. *See* Pet. 17-18 (citing 29 U.S.C. § 1399(c)(5)). Petitioners fail to appreciate the distinction between circumstances presenting a substantial likelihood of

In sum, the court of appeals expressly relied on this Court's teaching in *Bay Area* when it applied the common law doctrine of anticipatory repudiation to the circumstances presented in this case. Its decision took account of the relevant provisions of the MPPAA, and it does not conflict with the decision of any other court of appeals. Indeed, petitioners point to no other court of appeals case that deals with the accrual of a withdrawal liability action in similar circumstances, much less a case that conflicts with the Seventh Circuit's decision here. Their petition for certiorari reduces to a contention that the court of appeals erred in its application of *Bay Area* to the unique factual circumstances of this case. As discussed above, petitioners are incorrect, but even if their argument had more merit, they have provided no justification for this Court to review this fact-bound dispute.

II. THE JUDGMENT IN THIS CASE COULD ALSO BE AFFIRMED, IN THE ALTERNATIVE, BASED ON PRIOR TRANSACTIONS THAT WOULD HAVE TRIGGERED THE STATUTE OF LIMITATIONS EVEN EARLIER

The court of appeals identified several dates and events as potential triggers for the acceleration of Allied Grocers' withdrawal liability obligation and the six-year statute of limitations:

- May 18, 1990 - the date when Central States filed proofs of claim in the Allied Grocers' Bankruptcy.

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nonpayment (the trigger for default under Section 1399(c)(5)) and the circumstances of this case, where an employer in bankruptcy has, by ceasing operations, rendered itself wholly unable to pay. Neither the statute nor *Bay Area* specifically addresses the consequences of default in these circumstances. In any event, Central States' argument is purely academic because, as noted above, Central States' own rules in this case provided for *mandatory* acceleration immediately upon Allied Grocers' default.

- June 2, 1990 - the date when Allied Grocers ceased operations and withdrew as a matter of law from the Central States pension plan.

- June 18, 1990 - the date when Central States sent its Notice and Demand to Allied Grocers, demanding payment in full of the calculated withdrawal liability.

Each of these events occurred more than six years before Central States filed its collection action. Thus, the judgment in this case is correct no matter which event, singly or in combination, triggered Central States' acceleration of Allied Grocers' withdrawal liability.

That debt reasonably could have been accelerated (and the statute of limitations begun) as early as May 18, 1990, when Central States filed proofs of claims in Allied Grocers' Bankruptcy, demanding payment in full of the calculated withdrawal liability. Although the court of appeals rejected this filing as the event constituting Allied Grocers' default and Central States' acceleration, at least one district court has found such an event qualifying. In *I.L.G.W.U. National Retirement Fund v. Meredith Grey, Inc.*, 190 F.R.D. 324 (S.D.N.Y. 1999), an employer filed for bankruptcy, and the pension fund then filed a proof of claim in the bankruptcy proceedings for the entire amount of withdrawal liability. The district court, relying on this Court's decision in *Bay Area*, found as follows:

> [O]n July 16, 1987, the Fund filed a proof of claim in the [employer's] bankruptcy proceedings, thereby accelerating all payments and demanding the entire amount of the withdrawal liability. *Under Bay Area Laundry, the statute of limitations began to run on the full amount of the withdrawal liability upon the acceleration of the debt. Accordingly, the relevant*

> *limitations period expired on July 16, 1993—six years after the acceleration.*

Id. at 328 (citation omitted) (emphasis added). The judgment in this case is sustainable under this same analysis.

The debt in this case could also reasonably have been accelerated (and the statute of limitations begun) on June 2, 1990, when Allied Grocers ceased operations, thereby effecting a complete withdrawal from Central States' pension plan. Indeed, the court of appeals acknowledged that "it is arguable that the statute of limitations actually began to run earlier than June 18, on June 2, since Central States had already computed the withdrawal liability and sent notice of the amount, via the proof of claim, to Allied ...." Pet. App. 10a. This provides a second alternative basis for affirmance.

On June 18, 1990, Central States sent its Notice and Demand for payment of withdrawal liability to Allied Grocers for the same amount previously demanded in Central States' proofs of claim in the Bankruptcy. The court of appeals held that the statute began to run at that time. Coupled with the cessation of Allied Grocers' operations, the court concluded that the Notice and Demand completed the chain of events leading from Allied Grocers' default to the commencement of the statute of limitations.

Under any of these analyses, the result is the same: Central States' suit was time-barred, since the Complaint seeking payment in full of Allied Grocers' withdrawal liability was filed more than six years after any of these relevant events. Because the judgment, amply justified by the court of appeals' opinion, is also sustainable on alternate grounds, petitioners' plea for error-correction should fall on especially deaf ears.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: November 30, 2001

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1383. Complete Withdrawal

(a) Determinative factor. For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

* * *

29 U.S.C. § 1399. Notice, collection, etc. of withdrawal liability

* * *

(c) Payment requirements; amount, etc.

* * *

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b) (1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

* * *

Supreme Court, U.S.
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No. 01-563

IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

BASIC AMERICAN INDUSTRIES INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING THE WRIT	1
I. THE DECISION BELOW CONFLICTS WITH *BAY AREA* NOTWITHSTANDING THE DIFFERING FACTUAL CONTEXT BECAUSE THE PERMISSIVE NATURE OF ACCELERATION UNDER THE STATUTE CONTROLS IN ALL FACTUAL CONTEXTS	2
II. RESPONDENTS' ASSERTION THAT CENTRAL STATES ACCELERATED THE PAYMENT SCHEDULE IS INCORRECT	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp., 522 U.S. 192, 118 S.Ct. 542 (1997) 1, 2, 3, 5, 7, 8, 9, 10
Board of Trustees v. Kahle Engineering Corp., 43 F.3d 852 (3rd Cir. 1994) 3, 4, 5, 6, 9, 10
Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957 (1986) 1
Miller v. French, 530 U.S. 327, 120 S.Ct. 2246 (2000) 3
Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 101 S.Ct. 1571 (1981) 5
Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456 (1989) 4
TRW Inc. v. Andrews, 534 U.S. ___, 122 S.Ct. 441 (2001) 1, 5, 10
United States v. Feterl, 849 F.2d 354 (8th Cir. 1988) 1, 8

STATUTES

11 U.S.C. § 101(5)(A) 7
29 U.S.C. § 1301(b)(1) 6
29 U.S.C. § 1382 9
29 U.S.C. § 1399(b)(1) 9
29 U.S.C. § 1399(c)(5) 2, 3, 9

REASONS FOR GRANTING THE WRIT

Respondents assert that Petitioners have not demonstrated a conflict between the decision below and this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542 (1997). Contrary to Respondents' assertion, and as explained in both the Petition and below, the Seventh Circuit's decision in this case clearly conflicts with *Bay Area* by incorporating a common law doctrine that conflicts with the statutory text that this Court authoritatively construed in *Bay Area* to provide for only permissive acceleration. The conflict is made plain by this Court's decision just this Term in *TRW Inc. v. Andrews*, 534 U.S. ___, 122 S. Ct. 441, 447 (2001), wherein the Court held that federal courts are not free to incorporate common law doctrines into statutes where the statute is not silent on the issue that the doctrine addresses. This conflict with the Court's precedents warrants the Court's review. Supreme Court Rule 10(c); *see, e.g, Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961 (1986) (conflict with Supreme Court precedent warrants grant of certiorari). Further, the issue has importance beyond the context of the statute at issue in this case because numerous statutes and contracts interpreted under federal law create payment schedules and provide a mechanism for the acceleration of payments. *See, e.g., United States v. Feterl*, 849 F.2d 354, 356 (8th Cir. 1988) ("Before the limitations period begins to run, a lender must, at least, have invoked the acceleration clause in the loan agreement").

I. THE DECISION BELOW CONFLICTS WITH *BAY AREA* NOTWITHSTANDING THE DIFFERING FACTUAL CONTEXT BECAUSE THE PERMISSIVE NATURE OF ACCELERATION UNDER THE STATUTE CONTROLS IN ALL FACTUAL CONTEXTS.

The thrust of Respondents' argument is that the decision below does not conflict with *Bay Area* because the Court "did not purport, however, to discuss or define all circumstances or events that might result in 'acceleration.'" (Respondents' Brief in Opposition, p. 7.) Contrary to Respondents' assertion, this Court did define, in interpreting the statute, the situations that constitute a "default" and when that "default" results in "acceleration." The statute defines a "default" as:

> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notice notification from the plan sponsor of such failure, and
>
> (B) *any other event* defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. § 1399(c)(5) (emphasis added). The broad terms of the "any other event" language in subparagraph (c)(5) make it clear that the statute's definition of "default" encompasses "any" fact situation that the common law would hold creates an anticipatory repudiation.

The consequences of a default are also defined by the statute. The statute provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability . . . ." 29 U.S.C. § 1399(c)(5). As the Court stated in *Bay Area*, "[f]or limitations purposes, we cannot assume that a default will or should invariably lead to acceleration, for the

statutory acceleration provision is by its terms permissive." 522 U.S. at 208-09, 118 S.Ct. at 552. Since the permissive acceleration language applies both to a default caused when an employer misses a schedule payment *and* to a default because of "any other event," the factual scenario leading to the default is immaterial to the Court's conclusion in *Bay Area* that the permissive nature of the statute means that acceleration cannot be presumed.

Respondents would have the Court believe that despite the fact that under the statute acceleration is permissive with respect to all defaults, there is a subclass of defaults for which the permissive rule does not apply. However, to read such a rule would change the acceleration provision from permissive to mandatory in derogation of the statutory text. As the Third Circuit stated:

> The position of Kahle and Navco that the whole sum becomes due and the whole claim accrues when the first payment is missed in effect imposes a compulsory acceleration clause. This reads out of the statute the relevant statutory provision with respect to acceleration codified in 29 U.S.C. Sec. 1399(c)(5), which makes acceleration discretionary . . . . One must assume that when Congress provided that in the event of default "a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability," Congress also intended that the plan sponsor could decide not to accelerate the outstanding balance. That option is nugatory if Kahle is correct, because the claim would accrue automatically upon default.

Board of Trustees v. Kahle Engineering Corp., 43 F.3d 852, 859 (3rd Cir. 1994); *see also Miller v. French*, 530 U.S. 327, 337-38, 120 S.Ct. 2246, 2253 (2000) (interpreting statute to make mandatory language permissive would "subvert the plain meaning of the statute"). Not only does the Seventh Circuit's attempt to make the permissive language in the statute mandatory in this case directly conflict with *Bay Area*,

it conflicts with the Third Circuit's interpretation of the same statutory language in *Kahle Engineering*. This conflict exists notwithstanding the different factual scenarios because the permissive nature of the statute applies to *all* factual scenarios by virtue of the statutory language itself.

The Seventh Circuit's reason for incorporating the common law doctrine of anticipatory repudiation can be summed up in the Seventh Circuit's own words:

> Acceleration clauses are inserted to fill a hole in the law of contracts, which has failed here in its traditional and important function of interpolating rights and duties that the parties can be expected to negotiate for, and thus of economizing on the costs of transacting. Acceleration clauses are a standard contract provision for protecting the payee against the consequences of breach by the other party; they would be unnecessary were it not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation.

(Appendix A at 7a.) As the quoted language indicates, the Seventh Circuit apparently considered the statutory text as if it were a mere contract between the parties and then went about "interpolating" terms that the "parties" apparently should have included. But the role of a federal court in interpreting a statute "is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 460 (1989). Even putting aside the dubious proposition that a statute should be interpreted as a mere contract, Congress itself has "filled the hole" by including an acceleration provision in the statute. Having done so, Congress made acceleration permissive. As this Court has stated "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to

interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34, 101 S.Ct. 1571, 1583 n.34 (1981).

It is one thing to use common law principles to fill in the "gaps" in a federal statute to deal with situations not contemplated by Congress. It is quite another matter to apply common law principles to a circumstance that was expressly addressed by the statute, and to achieve a result that cannot be reconciled with the text of the statute. In this case, the Seventh Circuit used common law principles to produce an interpretation of the statute which is at odds with the text of the statute, *Bay Area*, and the Third Circuit's decision in *Kahle Engineering*.

A case decided just this Term highlights the conflict between the Seventh Circuit's decision in this case and this Court's jurisprudence. In *TRW Inc. v. Andrews*, 534 U.S. ___, 122 S.Ct. 441 (2001), this Court rejected the application of the discovery rule to a cause of action under the Fair Credit Reporting Act ("FCRA"). The FCRA contains a two-year statute of limitations from the date the "liability arises" but also provides that in the case of a willful misrepresentation, an action may be brought within two years of the discovery of the misrepresentation. In rejecting the application of a general discovery rule, the Court noted that the FRCA "did not cry out for the application of a discovery rule, nor is the statute "silent on the issue" of when the statute of limitations begins to run." *Id.* at ___, 122 S.Ct. at 447. Instead, the Court found that the inclusion of a limited discovery rule in the statute implied the exclusion of a more general rule. *Id.*

In reaching its conclusion, the Court stated that it read Congress' codification of one common law doctrine (tolling the statute when a willful misrepresentation was made) as an intentional rejection of other common law doctrines (a general discovery rule). *Id.* at ___ n.5, 122 S.Ct. at 449 n.5. In *Kahle Engineering*, the Third Circuit analogized default *and*

acceleration to the common law doctrine of anticipatory repudiation. 43 F.3d at 857. To the extent that including default and acceleration under the statute constitutes a codification of the common law principle of anticipatory repudiation, making acceleration permissive under all circumstances is an intentional rejection of any doctrine causing the cause of action to accrue with respect to the entire payment schedule absent an election by the creditor. Yet the Seventh Circuit not only incorporated a common law doctrine to fill a gap under the statute that does not exist, it chose to modify the doctrine as well because the doctrine never applied where the creditor has fully completed performance.

All Respondents can offer by way of rejoinder is to criticize the cases cited by Petitioners as "obsolete," and to assert that the cases "do not come close to establishing a current majority rule." (Respondents' Brief in Opposition, pp. 13-14.) Yet Respondents cite no cases in support of their version of the rule. The fact that Respondents argue that there is no "current majority rule" makes it clear that it cannot be inferred that Congress intended the doctrine of anticipatory repudiation to apply when the contours of the doctrine itself cannot be definitively established.

Finally, Respondents contend that the fact that the statute defines the "employer" as all trades or businesses under common control with the contributing employer, 29 U.S.C. § 1301(b)(1), is immaterial because default for one member of the controlled group is default for all. While this statement is true, it misses the point. Default is defined by the statute and so are the consequences of default (permissive acceleration). Respondents ask the Court not to follow the statute but rather to incorporate the common law doctrine of anticipatory repudiation. However, as the Seventh Circuit noted, under the common law doctrine, a "breach occurs when it is reasonably certain that the other party is not going to meet its obligation under the contract in a timely fashion." Here, treating the statute as a contract, it was not at all

reasonably certain that the other party, namely *all* of the controlled group members, would not pay. Rather, at most all that can be said is that *one* controlled group member could not pay. This situation is a far cry from the reasonable certainty required under the common law doctrine.

II. RESPONDENTS' ASSERTION THAT CENTRAL STATES ACCELERATED THE PAYMENT SCHEDULE IS INCORRECT.

Respondents assert that "Central States thereafter demanded payment in full of the entire amount of the withdrawal liability obligation" (Respondents' Brief in Opposition, p.5) and refer to "Central States' demand of full payment." (Respondents' Brief in Opposition, p.12.) Contrary to Respondents' assertions, Central States never demanded payment of the entire schedule. Respondents point to several events that allegedly constituted acceleration, but none of them stand up under close examination.

The first date that Respondents suggest may have triggered acceleration was May 18, 1990, the date that Central States filed proofs of claim in the bankruptcy. In *Bay Area*, this Court held that "[t]he date of withdrawal cannot start the statute of limitations clock, because the MPPAA affords a plan no basis to obtain relief against an employer on that date." 522 U.S. at 201, 118 S.Ct. at 549. In this case, the withdrawal did not even occur until June 2, 1990, so by definition a cause of action cannot have existed prior to this date.

Despite the fact that a cause of action did not exist, there is a reason for filing a proof of claim prior to the existence of a cause of action. Under the Bankruptcy Code, the definition of a "claim" includes unmatured and contingent claims. 11 U.S.C. § 101(5)(A). As a result, it cannot be inferred from the mere filing of a proof of claim that a cause of action exists

or that a payment schedule has been accelerated. As stated by the Eighth Circuit in *United States v. Feterl*, 849 F.2d 354 (8th Cir. 1988):

> Because acceleration clauses are generally for the benefit of the creditor, courts tread lightly on the creditor's freedom to decide whether acceleration is immediately necessary upon the occurrence of a default. Therefore, acceleration is seldom implied, and courts usually require that an acceleration be exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender's intention and no doubt that the borrower is apprised that the option has been exercised.

Id. at 357 (citation omitted). Notwithstanding the fact that the filing of the proofs of claim cannot constitute acceleration because the filing preceded the date of withdrawal, filing the proofs of claim in this case did not constitute acceleration because there is no indication that Central States was exercising its option to accelerate. Rather, as the Seventh Circuit stated, Central States "demanded payment on the installment plan." (Appendix A at 10a.)

Second, Respondents suggest that the date of withdrawal itself (June 2, 1990), constituted the acceleration. However, as noted above, this Court in *Bay Area* held that the date of withdrawal itself does not create a cause of action under the statute. 522 U.S. at 201, 118 S.Ct. at 549 ("pension plan suit to collect the employer's withdrawal liability, commenced on the date of withdrawal, would be premature"). As a result, the withdrawal date cannot trigger acceleration because the cause of action has yet to exist.

Third, Respondents contend that June 18, 1990, was the date of acceleration because Central States sent a notice and demand on that date. However, the issuance of a notice and demand is merely part of the process that leads to an ultimate cause of action; the mere issuance of the notice and demand is not sufficient. As this Court stated in *Bay Area*, "[o]nce the demand is made, the employer's baseline obligation is to

make each payment as scheduled, unless it chooses to prepay or the plan properly exercises the acceleration option. Until the employer fails to honor its obligation, the plan cannot sue." *Id.* at 202, 118 S.Ct. at 549 (citations omitted). In *Kahle Engineering*, the Third Circuit noted that the notice and demand is required by one part of the statute, 29 U.S.C. §§ 1382, 1399(b)(1), and the discretionary notice of acceleration is required by 29 U.S.C. § 1399(c)(5). 43 F.3d at 861 n.9. This Court's reference in *Bay Area* to the "plan properly exercis[ing] the acceleration option," 522 U.S. at 202, 118 S.Ct. at 549, indicates that the notice of acceleration is distinct from the notice and demand. Otherwise, there would be no way to distinguish the two. *See Kahle Engineering*, 43 F.3d at 861 n.9 ("the acceleration provision would have no significance if the mandatory notice of the amount of withdrawal liability were also to be viewed as a notice of acceleration").[1]

Although the Seventh Circuit acknowledged that Central States "demanded payment on the installment plan," the Seventh Circuit held that this was immaterial to whether

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[1] Respondents suggest briefly that the default automatically triggered acceleration under the terms of Central States' plan and that the Seventh Circuit made a "factual finding" to that effect. (Respondents' Brief in Opposition, pp.12-13.) Contrary to Respondents' assertion, the Seventh Circuit rejected this argument. The Seventh Circuit stated:

> The plan in this case contains an ipso facto clause. For it permits Central States to treat a member's declaration of bankruptcy as a default upon the occurrence of which "the outstanding amount of the withdrawal liability shall immediately become due and payable." The defendants' [Respondents'] argument that the clause was even more-was a Doomsday Bomb *requiring* Central States, whether it wanted to or no, to treat the declaration of bankruptcy as a default, is contrary to the plan's terms, which are permissive rather than mandatory . . . ."

(Appendix A at 9a.) Thus, as the Seventh Circuit correctly recognized, the plan defines when a default has occurred but does not require acceleration in the event of default.

Central States "didn't think Allied had defaulted." (Appendix A at 10a.) As the Seventh Circuit stated, "[t]he statute *required* Central States to formulate an installment plan." (Appendix A at 10a.) What this passage from the Seventh Circuit shows is that it confused the question of whether default occurred with the question of whether acceleration occurred. Viewed in the proper light, the fact that the statute requires a pension fund to formulate an installment plan cuts against the Seventh Circuit's position because under the Seventh Circuit's view the standard notice and demand constitutes a notice of acceleration. However, as demonstrated in the proceeding paragraph, this view is contrary to the statute, *Bay Area*, and *Kahle Engineering*.

CONCLUSION

The decision below conflicts with this Court's decision in *Bay Area* by disregarding the plain language of the statute as authoritatively construed by this Court in favor of incorporating the common law doctrine of anticipatory repudiation which contradicts the terms of the statute. Under the Seventh Circuit's decision, pension funds will lose their ability to forego acceleration because they will be unsure as to their rights under the ill-defined doctrine of anticipatory repudiation. The decision below will also impact numerous other federal statutes requiring multiple payments because parties will not be able to rely on the plain meaning of the statute as it pertains to the statute of limitations but will instead be required to consider common law doctrines that are not mentioned in the statute (or even worse, as here, conflict with the statute). *See TRW Inc. v. Andrews*, 534 U.S. ___, 122 S.Ct. 441, 453 (Scalia, J., concurring) (stating that application of unspecified common law principles "casts the meaning of innumerable other limitation periods in doubt"). For these reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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